IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 1:21-cv-02774-RMR-KAS
Consolidated with 1:21-cv-3215-RMR-KAS

JOHNNY R. SHAFER,
DAVID P. SARRO,
KEVIN L. TYE,
JESS Q. WILLIAMS,
JUSTIN COHEN,
Individually and On Behalf of All Others Similarly Situated,

Plaintiffs,

v.

LIGHTNING EMOTORS, INC.,
TIMOTHY R. REESER,
TERESA P. COVINGTON,
GIGACQUISITIONS3 LLC,
GIGCAPITAL GLOBAL,
AVI S. KATZ,
RALUCA DINU,
NEIL MIOTTO
GIGFOUNDERS LLC
BRAD WEIGHTMAN,
ANDREA BETTI-BERUTTO,
PETER WANG,
JOHN J. MIKULSKY, and
ROBERT FENWICK-SMITH,

Defendants.

PLAINTIFFS' MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT AND APPROVAL OF PLAN OF ALLOCATION

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SECONDARY AUTHORITIES

Lead Plaintiffs David P. Sarro, Kevin L. Tye, and Jess Q. Williams ("Federal Plaintiffs"), and the plaintiff in the related Delaware Court of Chancery action, Richard Delman ("State Plaintiff") (together, "Plaintiffs"), respectfully submit this motion for final approval of the Settlement[1], and approval of the Plan of Allocation.[2]

I. INTRODUCTION

Plaintiffs have obtained a Settlement of the Actions[3] for $13,350,000 in cash. This is a significant and highly beneficial result. It represents more than a 13.3% recovery of overall class-wide potentially recoverable damages which sets it apart from settlements in similar cases where the historical median recovery is only 5.3%. The proposed Settlement is further supported by the fact that it eliminates all factual and legal risks Plaintiffs would have faced had the Actions continued. Consequently, Plaintiffs request final approval of the Settlement so that this litigation can be brought to a close once and for all and that Plaintiffs and other Settlement Class Members can receive their share of the recovery without any further delay.

Plaintiffs previously described in their Motion for Preliminary Approval (ECF 126) the strengths, weaknesses, and bases for the Settlement. As set forth herein and in the

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[1] Unless noted, capitalized terms are defined in the Stipulation of Settlement (ECF 127) ("Stipulation"), and all emphasis is added and citations are omitted.

[2] Pursuant to D.C.COLO.L.CivR 7.1(a), Plaintiffs' Counsel have conferred with Defendants' Counsel who do not oppose the foregoing relief.

[3] The "Actions" are this case (the "Federal Action") and *Delman v. GigAcquisitions3, LLC, et al.*, No. 2021-0679-LWW (Del. Ch.) (the "State Action").

previously filed papers, Plaintiffs achieved this Settlement only after conducting a thorough investigation of the facts and circumstances underlying their claims, including analysis of extensive public (and in the State Action, nonpublic) documents and (in the Federal Action) interviews of former Lightning employees, as well as extensive briefing on Defendants' motions to dismiss. Given the relative strengths and weaknesses of the claims asserted in the Actions and the meaningful recovery of cash obtained for the Settlement Class, Court-appointed Lead Plaintiffs and State Plaintiff believe the Settlement is a favorable result and fully endorse the requested approval.

The Settlement also satisfies each of the factors considered in the Tenth Circuit in deciding whether a settlement is fair, reasonable, and adequate. The Parties negotiated at arm's length with the assistance of a highly-experienced mediator, David M. Murphy, Esq., of Phillips ADR. Further, as mentioned above, the Settlement provides an immediate recovery to the Settlement Class while eliminating all risks associated with the Actions; thus, the prospects of a larger recovery at some point down the road are easily outweighed by the benefits received under the terms of the proposed Settlement. Plaintiffs also provided notice of the Settlement to over 27,900 potential class members through direct mailing and email as well as publishing in *The Wall Street Journal* and over *Business Wire*. The Notice clearly described the terms of the Settlement and how Settlement proceeds will be allocated among Authorized Claimants. Plaintiffs did not receive any objections in response to the Notice, thereby evidencing further support for granting final approval of the Settlement in its entirety.

The Settlement and Plan of Allocation are fair, reasonable, and adequate, and in the

best interest of the Settlement Class. Accordingly, Plaintiffs respectfully request that the Court grant final approval of the Settlement as set forth in the Stipulation and approve the proposed Plan of Allocation as fair, reasonable, and adequate.

II. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiffs' Motion for Preliminary Approval (ECF 126) and Joint Declaration of Hillary B. Stakem, Michael I. Fistel Jr. and Michael J. Barry ("Joint Decl.") (filed herewith), and adopted by reference herein, describe the factual background and procedural history of the Actions, the extensive efforts undertaken by Plaintiffs and Plaintiffs' Counsel during the course of the Actions, the risks of continued litigation, and the negotiations leading to the Settlement. *See* ECF 126 at 2-8, 10-14; Joint Decl., ¶¶6-77.

III. THE SETTLEMENT CLASS SHOULD BE CERTIFIED PURSUANT TO RULES 23(a) and 23(b)(3)

The "'Tenth Circuit has endorsed class actions as an appropriate means to resolve claims under the federal securities laws'" and allows class actions to be certified for purposes of settlement only.[4] *In re Thornburg Mortg., Inc. Sec. Litig.*, 912 F. Supp. 2d 1178, 1233 (D.N.M. 2012) (certifying settlement class alleging violations of both the Securities Act and Exchange Act). As part of the Settlement, the Parties here stipulated to the certification of the Settlement Class, including to the appointment of Plaintiffs as Class Representatives and Plaintiffs' Counsel as Class Counsel. ECF 127, ¶12.1. This Court conditionally certified the Settlement Class in the Preliminary Approval Order. ECF 130, ¶¶3-5. Nothing has occurred in the interim period to change the propriety of certifying the

[4] Unless otherwise noted, internal citations are omitted and emphasis is added.

Settlement Class pursuant to Rules 23(a) and 23(b)(3), and to avoid repetition, Plaintiffs respectfully refer the Court to pages 17-23 of their Motion for Preliminary Approval (ECF 126), adopted herein, for a full discussion of how each class certification requirement is satisfied.

IV. PLAINTIFFS HAVE PROVIDED SUFFICIENT NOTICE TO THE SETTLEMENT CLASS IN COMPLIANCE WITH RULE 23 AND DUE PROCESS

Under Rule 23(e)(1), a district court approving a class action settlement "must direct notice in a reasonable manner to all class members who would be bound by the proposal." Fed. R. Civ. P. 23(e)(1)(B). Rule 23(c)(2)(B) also provides that notice of a class settlement must be "the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Fed. R. Civ. P. 23(c)(2)(B); *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173 (1974) (class notice designed to fulfill due process requirements). Notice "'must be reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'" *Tennille v. W. Union Co.*, 785 F.3d 422, 436 (10th Cir. 2015).

As explained in Plaintiffs' Motion for Preliminary Approval (ECF 126, §VI), the Court-approved Notice and Proof of Claim (the "Notice Packet") satisfy these standards and amply inform Settlement Class Members of all relevant case and Settlement-related information. For these reasons, the Court's Preliminary Approval Order found that

> the form and content of the notice program described herein and the methods set forth herein for notifying the Settlement Class of the Settlement and its terms and conditions . . . meet the requirements of the Federal Rules of Civil Procedure (including Rule 23), the United States Constitution

> (including the Due Process Clause), Section 21D(a)(7) of the Securities Exchange Act of 1934, 15 U.S.C. §78u-4(a)(7), Section 27(a)(7) of the Securities Act of 1933, 15 U.S.C. §77z-1(a)(7), as added by the Private Securities Litigation Reform Act of 1995, the rules of this Court, and other applicable law, and constitute due and sufficient notice to all Persons entitled thereto.

ECF 130, ¶14.

Indeed, the combination of: (i) individual emails or First-Class Mail of more than 27,900 copies of the Notice Packet to potential Settlement Class Members who could be identified with reasonable effort and known record holders, supplemented by mailed notice to brokers and nominees; and (ii) publication of the Summary Notice in a relevant, widely-circulated publication, transmission on a newswire and through a settlement website, has proven highly successful and is typical of notice plans approved in securities class action settlements.[5] It was "the best notice . . . practicable under the circumstances." Fed. R. Civ. P. 23(c)(2)(B); *see, e.g.*, *Peace Officers' Annuity & Benefit Fund of Ga. v. DaVita Inc.*, 2021 WL 1387110, at *2 (D. Colo. Apr. 13, 2021) (approving a substantially similar proposed notice and method for mailing, distributing, and publishing the notice); *Or. Laborers Emps. Pension Tr. Fund v. Maxar Techs., Inc.*, 2024 WL 98387 (D. Colo. Jan. 1, 2024) (substantively identical notice program satisfied Rule 23(e)(2)(C)); *In re Voulgaris v. Array Biopharma Inc.*, 2021 WL 6331178, at *4 (D. Colo. Dec. 3, 2021) (same), *aff'd*, 60 F.4th 1259 (D. Colo. 2023).

[5] *See generally* Declaration of Ross D. Murray Regarding Notice Dissemination, Publication, and Requests for Exclusion Received to Date ("Murray Decl."), submitted herewith.

V. FINAL APPROVAL OF THE SETTLEMENT IS WARRANTED

It is well established within this Circuit that the settlement of a complex class action, such as this, is both favored and encouraged. *See Maxar*, 2024 WL 98387, at *4 (approving class action settlement, and noting that "'[s]ettlement agreements are to be encouraged because they promote the amicable resolution of disputes and lighten the increasing load of litigation faced by the federal courts'"); *accord DaVita*, 2021 WL 1387110, at *4. When evaluating a proposed settlement, courts are mindful "'not to decide the merits of the case or resolve unsettled legal questions.'" *Shaw v. Interthinx, Inc.*, 2015 WL 1867861, at *2 (D. Colo. Apr. 22, 2015).

Instead, Rule 23(e)(2) directs that courts may approve a class action settlement "after a hearing and only on finding that it is fair, reasonable, and adequate," when considering the following factors: "(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 . . . ; and (D) the proposal treats class members equitably relative to each other." Fed. R. Civ. P. 23(e)(2). The traditional factors examined by courts in the Tenth Circuit, with the exception of the fourth factor, overlap with those of Rule 23(e)(2):

> "(1) the settlement was fairly and honestly negotiated, (2) serious legal and factual questions placed the litigation's outcome in doubt, (3) the immediate recovery was more valuable than the mere possibility of a more favorable outcome after further litigation, and (4) [the parties] believed the settlement was fair and reasonable."

Tennille, 785 F.3d at 434 (alteration in original).[6]

This Court has preliminarily determined that the proposed Settlement for $13.35 million meets these standards and is fair, reasonable, and adequate. ECF 130, ¶2. As discussed below, the Court's initial disposition was correct – the Settlement easily satisfies each of the Rule 23(e)(2) and Tenth Circuit factors to support final approval.

A. Plaintiffs and Plaintiffs' Counsel Have Adequately Represented the Settlement Class

To determine if the class is adequately represented under Rule 23(e)(2), courts utilize Rule 23(a)(4)'s standard for evaluating adequacy for class certification purposes: "whether (1) 'the named plaintiffs and their counsel have any conflicts of interest with other class members'; and (2) 'the named plaintiffs and their counsel [have] prosecute[d] the action vigorously on behalf of the class.'" *In re Samsung Top-load Washing Mach. Mktg., Sales Pracs. & Prods. Liab. Litig.*, 2020 WL 2616711, at *12 (W.D. Okla. May 22, 2020) (alterations in original) (quoting *Rutter & Wilbanks Corp. v. Shell Oil Co.*, 314 F.3d 1180, 1187-88 (10th Cir. 2002)), *aff'd*, 997 F.3d 1077 (10th Cir. 2021). Plaintiffs' Counsel and Plaintiffs readily meet this factor.

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[6] The new Rule 23(e) factors "were not meant to displace any circuit's unique factors, but rather to focus courts on the core concerns in deciding whether to approve a proposed settlement." *DaVita*, 2021 WL 1387110, at *3. "The Tenth Circuit's additional factors largely overlap, with only the fourth factor not being subsumed into the new Rule 23. Accordingly, a court considers the Rule 23(e)(2) factors as the main tool in evaluating the propriety of the settlement but still addresses the Tenth Circuit's factors." *Id*.

First, neither Plaintiffs' Counsel nor Plaintiffs have any conflicts of interest with the Settlement Class. Plaintiffs' claims are typical of the Settlement Class Members, as they purchased Lightning Securities at prices inflated by Defendants' alleged material misstatements and omissions, and suffered damages as a result. Accordingly, their interests (maximizing the potential recovery to investors) are fully aligned with those of the Settlement Class. *See Array Biopharma*, 2021 WL 6331178, at *5 (no antagonistic interests where "Plaintiffs' interest in obtaining the largest-possible recovery in this Action was aligned with all Settlement Class Members"); *Maxar*, 2024 WL 98387, at *4 (same). Plaintiffs have also adequately represented the interests of the Settlement Class by retaining experienced counsel, and closely monitoring and participating in the Actions from the outset through resolution. *Maxar*, 2024 WL 98387, at *4 (lead plaintiff "adequately represented the interests of the settlement class by closely monitoring and participating in this litigation from the outset through resolution"); *see* Declaration of David P. Sarro ("Sarro Decl."), ¶2; Declaration of Kevin L. Tye ("Tye Decl."), ¶2; Declaration of Jess Q. Williams ("Williams Decl."), ¶2.

Second, and as set forth more fully in the Joint Declaration, at Plaintiffs' direction, Plaintiffs' Counsel vigorously prosecuted the Actions for three years on behalf of the Settlement Class. In addition to conducting thorough investigations using public information and speaking to more than a dozen former Lightning employees (in the Federal Action), Plaintiffs filed detailed complaints, faced motions to dismiss, consulted with economic experts regarding case theory, followed Lightning's receivership proceedings, and obtained and reviewed internal documents in discovery (in the State Action). Joint

Decl., ¶¶20-45. *See Maxar*, 2024 WL 98387, at *4 (adequacy evidenced by vigorous litigation that, as here, "created the leverage necessary to reach a favorable resolution for the class"). Further, Plaintiffs' Counsel are highly qualified litigators with extensive experience in securities litigation, and have long track records of adequately representing large groups of diverse investors in courts across the country. *See* https://www.johnsonfistel.com/; https://www.rgrdlaw.com/; https://www.gelaw.com/; *see also Array Biopharma*, 2021 WL 6331178, at *5 (counsel's adequacy supported by extensive experience in securities class action).

Accordingly, Plaintiffs and Plaintiffs' Counsel respectfully submit that they have adequately represented the Settlement Class and satisfy Rule 23(e)(2)(A) for purposes of final approval of the Settlement.

B. The Proposed Settlement Was Negotiated at Arm's Length and with an Experienced Mediator

The second factor under Rule 23(e)(2)(B) overlaps with the first factor considered by the Tenth Circuit, which assesses whether "the settlement was fairly and honestly negotiated." *Maxar*, 2024 WL 98387, at *2. The Settlement was achieved as a result of extensive, arm's-length negotiations assisted and supervised by David M. Murphy, Esq., of Phillips ADR, a highly respected third-party mediator experienced in complex litigation. Joint Decl., ¶¶6-8, 46-49; *see, e.g.*, *In re S. Co. S'holder Derivative Litig.*, 2022 WL 4545614, at *10 (N.D. Ga. June 9, 2022) (citing Mr. Murphy's facilitation as mediator in complex securities litigation supported fairness and reasonableness of settlement). The lengthy in-person mediation session involved thorough discussions regarding the parties' respective claims and defenses as well as the strengths and weaknesses of the Actions.

Joint Decl., ¶¶7, 46. The parties were unable to reach a compromise at the mediation, but continued negotiating over the next year until finally, the Mediator issued a settlement recommendation he felt was fair and reasonable based on his analysis of the facts and circumstances of the Actions, which both sides accepted. *Id.*, ¶¶8, 46-49. "Utilization of an experienced mediator during the settlement negotiations supports a finding that the settlement is reasonable, was reached without collusion and should therefore be approved." *In re Molycorp, Inc. Sec. Litig.*, 2017 WL 4333997, at *4 (D. Colo. Feb. 15, 2017); *Array Biopharma*, 2021 WL 6331178, at *6 (use of an active and independent mediator "provide strong support for approval of" a settlement).

Likewise, a strong presumption of fairness attaches to a class action settlement reached through arm's-length negotiations among able and well-versed counsel. *Array Biopharma*, 2021 WL 6331178, at *5. The Settlement was reached at a stage when Plaintiffs' Counsel were well-versed on the strengths and weaknesses of the Actions, having thoroughly investigated the complaints, faced one or more rounds of briefing on Defendants' motions to dismiss, and exchanged mediation position statements. Joint Decl., ¶¶7, 16-47.

Because the Settlement was fairly and honestly negotiated, the requirements of Rule 23(e)(2)(B) are met.

C. The Costs, Risks, and Delay of Trial and Appeal

The third factor considered under Rule 23(e)(2) instructs courts to consider the adequacy of the settlement relief in light of "the costs, risks, and delay of trial and appeal." *See* Fed. R. Civ. P. 23(e)(2)(C)(i). This factor overlaps with the combined second and third

factors considered by the Tenth Circuit – whether "'serious legal and factual questions placed the litigation's outcome in doubt'" and whether "'the immediate recovery was more valuable than the mere possibility of a more favorable outcome after further litigation.'" *Tennille*, 785 F.3d at 434; *see Array Biopharma*, 2021 WL 6331178, at *7-*8.

1. Serious Legal and Factual Questions Placed the Litigation's Outcome in Doubt

If the Actions were to continue, serious questions of law and fact would place the outcome in significant doubt. Courts within this Circuit and nationwide recognize that securities class actions are notoriously complex and present numerous hurdles at all stages of litigation. *E.g.*, *Array Biopharma*, 2021 WL 6331178, at *7 (noting that "'litigating an action under the PSLRA is not a simple undertaking'"); *In re Crocs, Inc. Sec. Litig.*, 2014 WL 4670886, at *3 (D. Colo. Sept. 18, 2014) ("Litigating an action under the PSLRA is not a simple undertaking . . . ."). This case is no exception – indeed, the Federal Complaint was dismissed, and although Federal Plaintiffs believe they could have successfully amended their claims, there was no guarantee they would be able to do so. *See* ECF 111.

Given the risks and challenges inherent in litigating the Actions, Plaintiffs and Plaintiffs' Counsel believe that the proposed Settlement is in the best interests of the Settlement Class. In the first instance, law surrounding SPACs is still developing, and the application of the federal securities laws and Delaware law to cases involving SPACs, SPAC management incentives, and representations made in SPAC offering documents continues to evolve. This alone increased the fundamental uncertainty as to whether Plaintiffs would succeed at later junctures, including in navigating the ever-increasingly complex class certification analysis.

Federal Plaintiffs also faced significant risk in seeking to plead and prove that Defendants made (with scienter) materially false or misleading statements regarding GigCapital3's Mentor-Investor strategy, Lightning's ability to scale, and the strength of its supply chain – particularly in light of the PSLRA's restriction on discovery before a motion to dismiss has been denied. And while Federal Plaintiffs believe in the merits of their claims, even if the Court granted them leave to file an amended complaint, there could be no assurance that that complaint would survive Defendants' renewed motions to dismiss, let alone summary judgment, trial, and inevitable appeals. *See McNeely v. Nat'l Mobile Health Care, LLC*, 2008 WL 4816510, at *13 (W.D. Okla. Oct. 27, 2008) (a denial of the motion to dismiss "provides no guarantee that [Plaintiffs] will ultimately prevail on the merits").

Similarly, State Plaintiff's breach of fiduciary duty and unjust enrichment claims, while having survived a motion to dismiss, also involved significant risk. Not only would State Plaintiff need to prove that Defendants impaired GigCapital3 stockholders' redemption rights through the issuance of misleading proxy solicitation materials, but he also would need to establish the true (lower) value of Lightning utilizing contested expert testimony.

Next, Defendants would undoubtedly file dispositive motions, including motions for summary judgment and *Daubert* motions, and if Plaintiffs' claims survived those motions, trial would be lengthy, complicated, and risky. *See In re Sprint Corp. ERISA Litig.*, 443 F. Supp. 2d 1249, 1261 (D. Kan. 2006) ("[E]ven if plaintiffs could have survived defendants' motions for summary judgment, additional serious questions of law and fact also would

have placed in doubt the value of the recovery plaintiffs might have been able to obtain."). And ultimately, should either Federal or State Plaintiffs be successful in their litigation, the costly, protracted proceedings would have substantially or completely drained Lightning's insurance policies – the only assets remaining to it to pay any judgment obtained in either of the Actions. Accordingly, there was substantial risk in both Actions of obtaining no recovery from Lightning, regardless of a successful outcome at trial.

Considering the complex legal and factual issues associated with continued litigation, as well as the limited available sources of recovery following Lightning's receivership, there is an undeniable and substantial risk that, after years of continued litigation and additional delays, the Settlement Class could have received an amount significantly less than the Settlement Amount, or nothing at all.

2. The Value of the Recovery Is Particularly Significant in Light of the Delay of Further Litigation

"[I]n assessing a settlement, courts weigh the recovery 'against the possibility of some greater relief at a later time, taking into consideration the additional risks and costs that go hand in hand with protracted litigation.'" *Array Biopharma*, 2021 WL 6331178, at *8. As discussed above, Defendants may have had credible defenses to many of Plaintiffs' claims and there is good reason to believe that Plaintiffs may not have been able to recover the full amount of a judgment against Lightning. On the other hand, the $13.35 million relief offered by the proposed Settlement is substantial, representing approximately 13.3% of the maximum estimated recoverable damages in the Actions. *See* Joint Decl., ¶96. This percentage recovery is between two to three times the 5.3% median ratio of settlement amount to estimated investor losses for securities class actions in 2023 where damages

are between $75 and $149 million.[7] *Id.* Indeed, courts within this Circuit have found settlements representing less than 2% of estimated damages as appropriate for final approval. *See, e.g.*, *In re Crocs, Inc. Sec. Litig.*, 306 F.R.D. 672, 691 n.20 (D. Colo. 2014) (noting recovery of approximately 1.3% of amount of damages "is in line with the median ratio of settlement size to investor losses"). Further, there is something to be said about the additional value inherent in immediacy. *See Thornburg*, 912 F. Supp. 2d at 1244 ("'To most people, a dollar today is worth a great deal more than a dollar ten years from now.'") (quoting *Reynolds v. Beneficial Nat'l Bank*, 288 F.3d 277, 284 (7th Cir. 2002)). This is particularly so where the size of any potential recovery would have been reduced by additional costs incurred by Plaintiffs' Counsel in taking this case through trial and likely appeals, and the potential sources of recovery (*e.g.*, Lightning's insurance policy) depleted through further defense costs throughout the proceedings.

Indeed, while the Actions have been pending for approximately three years, absent settlement there would likely be many more years of hard-fought litigation ahead. The Parties and the Courts would expend significant time, resources, and costs to complete pre-trial proceedings, including completion of discovery, and briefing on Defendants' likely summary judgment and *Daubert* motions. These risks were heightened by the fact that Defendants were represented by skilled lawyers from two of the leading corporate litigation

[7] *See* Laarni T. Bulan & Laura E. Simmons, *Securities Class Action Settlements: 2023 Review and Analysis*, at 6, Fig. 5 (Cornerstone Research 2024), available at www.cornerstone.com/wp-content/uploads/2024/03/Securities-Class-Action-Settlements-2023-Review-and-Analysis.pdf.

firms in the country, DLA Piper LLP (US) and Freshfields Bruckhaus Deringer (US) LLP. *See Thornburg*, 912 F. Supp. 2d at 1206 ("[A]ny insurance proceeds which remain could be depleted by covering the defense costs necessary to go to trial, including discovery, depositions, and time in court."). Even assuming State and Federal Plaintiffs were successful in trying their respective cases, Defendants could still appeal any verdict eventually obtained, which could take years to resolve and would unnecessarily expend judicial resources. *See, e.g.*, *Lucas v. Kmart Corp.*, 234 F.R.D. 688, 694 (D. Colo. 2006) ("If this case were to be litigated, in all probability it would be many years before it was resolved.").

Courts routinely recognize the value of an immediate recovery in the face of delays and uncertainty. *See McNeely*, 2008 WL 4816510, at *13 ("The class . . . is better off receiving compensation now as opposed to being compensated, if at all, several years down the line, after the matter is certified, tried, and all appeals are exhausted."); *Crocs*, 306 F.R.D. at 691 ("[The] immediate recovery in this case outweighs the time and costs inherent in complex securities litigation, especially when the prospect is some recovery versus no recovery.").

Considering the hurdles associated with continued litigation, the immediate, substantial relief offered by the $13.35 million Settlement greatly outweighs the "mere possibility of [a more favorable outcome] after protracted and expensive litigation over [many years in the future]." *See Array Biopharma*, 2021 WL 6331178, at *8. Accordingly, consideration of the costs, risks, and delay of trial and appeal strongly weighs in favor of the Settlement.

D. The Proposed Method for Distributing Relief Is Effective

As demonstrated above and discussed in more detail in the Murray Declaration, the method of disseminating the notice and the claims administration process are both "effective" pursuant to Rule 23(e)(2)(C)(ii). As described in §IV, above, Plaintiffs and Plaintiffs' Counsel provided the best notice practicable under the circumstances in accordance with the Court's Preliminary Approval Order and the requirements of Rule 23, due process, and the PSLRA. The Notice and claims processes are similar to that commonly used in securities class action settlements and provide for *pro rata* distributions based on the trading information provided. *See* §§I and IV, above. As described in §VI, the proposed Plan of Allocation was formulated by Plaintiffs' Counsel's economics and damages expert consultant. It is designed to fairly and rationally allocate the proceeds of this Settlement to the Settlement Class in a cost-effective manner. Thus, Plaintiffs respectfully submit that they have demonstrated a thorough and effective method of distributing relief, further supporting final approval.

E. The Requested Attorneys' Fees

Rule 23(e)(2)(C)(iii) addresses "the terms of any proposed award of attorney's fees, including timing of payment." Fed. R. Civ. P. 23(e)(2)(C)(iii). As discussed in Plaintiffs' Counsel's separate application, they seek an award of attorneys' fees in the amount of one-third of the Settlement Amount, in addition to interest earned on such amount. This request is in line with recent fee awards in this District. *See* Plaintiffs' Counsel's Motion for an Award of Attorneys' Fees and Expenses and Award to Federal Plaintiffs in Connection with their Representation of the Settlement Class, at 6. Further, this is an all-cash, non-

reversionary settlement and the ***entire*** Net Settlement Fund will be distributed to Settlement Class Members until it is no longer economically feasible to do. ECF 127, ¶7.8. As such, there is no risk that Plaintiffs' Counsel will be paid but Settlement Class Members will not.[8]

F. The Parties Have No Additional Agreement Other Than an Agreement to Address Requests for Exclusion

Rule 23(e)(2)(C)(iv) requires the consideration of any agreement required to be disclosed under Rule 23(e)(3). As disclosed in moving for preliminary approval, the Parties have entered into a standard supplemental agreement providing that, in the event Settlement Class Members with Class Period purchases of Lightning Securities that exceed a certain threshold validly request exclusion from the Settlement Class, Defendants shall have the option to terminate the Settlement. ECF 127, ¶10.3. These types of agreements are "standard in securities class action settlements and [therefore] ha[ve] no negative impact on the fairness" of the Settlement. *See Christine Asia Co., Ltd. v. Yun Ma*, 2019 WL 5257534, at *15 (S.D.N.Y. Oct. 16, 2019).

G. Settlement Class Members Are Treated Equitably

Rule 23(e)(2)(D) considers whether class members are treated equitably. As discussed further below in §VI, all Settlement Class Members are treated equitably under the terms of the Stipulation, including the Plan of Allocation set forth in the Notice. The Plan of Allocation provides that each Settlement Class Member that properly submits a

[8] The Settlement provides that any attorneys' fee award shall be paid to Plaintiffs' Counsel after the Court executes an order awarding such fees. ECF 127, ¶5.1.

valid Proof of Claim will receive his, her, or its *pro rata* share of the Net Settlement Fund. Indeed, each of the Federal Plaintiffs and State Plaintiff will be subject to the same formula for distribution of the Net Settlement Fund as every other Settlement Class Member. This factor therefore supports granting final approval of the Settlement. *See Maxar*, 2024 WL 98387, at *5 (factor supports approval where "the settlement fund will be allocated to authorized claimants on a *pro rata* basis based on the relative size of their recognized claims").

H. The Parties Believe the Settlement Is Fair and Reasonable

The final factor courts in the Tenth Circuit consider is whether the parties view the settlement as fair and reasonable. Plaintiffs and Plaintiffs' Counsel both strongly endorse the Settlement as fair and reasonable, and believe it is in the best interests of the Settlement Class. *See* Joint Decl., ¶¶11-12, 59-63; Sarro Decl., ¶3; Tye Decl., ¶3; Williams Decl., ¶3; Affidavit of Richard Delman, ¶3. Plaintiffs' Counsel have extensive experience litigating securities class actions (*See* https://www.johnsonfistel.com/; https://www.rgrdlaw.com/; https://www.gelaw.com/) and considered the risks and delays of continued litigation and the range of possible recovery. Joint Decl., ¶¶59-77. As a result, this factor weighs heavily in favor of final approval. *See Maxar*, 2024 WL 98387, at *4 ("[T]he Court gives weight to the judgment of Lead Counsel [Robbins Geller], who are highly experienced in prosecuting securities class actions.").

Additionally, the reaction of the Settlement Class to date has been overwhelmingly positive. While over 27,900 Notice Packets have been mailed or emailed, and the Summary Notice has been published, no objections or opt outs have been received.

Murray Decl., ¶¶11-12, 16. This positive reaction further evidences the merit of the Settlement. *See Diaz v. Lost Dog Pizza, LLC*, 2019 WL 2189485, at *3 (D. Colo. May 21, 2019) ("The fact that no class member objects shows that the class also considers this settlement fair and reasonable."); *Maxar*, 2024 WL 98387, at *5.

VI. THE PROPOSED PLAN OF ALLOCATION IS FAIR, REASONABLE, AND ADEQUATE

The proposed Plan of Allocation, set forth in the Notice, details how the Net Settlement Fund is to be allocated among Authorized Claimants. The standard for approval of a plan of allocation is the same as the standard for approving a settlement: whether it is "fair, reasonable, and adequate." *See Kmart*, 234 F.R.D. at 695. In making this determination, courts give great weight to the recommendation of experienced counsel. *See id.* ("'An allocation formula need only have a reasonable, rational basis, particularly if recommended by "experienced and competent" class counsel.'").

Here, the Plan of Allocation was formulated in consultation with Plaintiffs' Counsel's expert economic damages consultant, and is consistent with Plaintiffs' allegations. Further, the Plan of Allocation will distribute the Net Settlement Fund on a *pro rata* basis, as determined by the ratio that the Authorized Claimant's Recognized Claim bears to the total Recognized Claims of all Authorized Claimants. Calculation of a Recognized Claim will depend upon several factors, including when the securities were purchased, acquired, sold, or held.

Plaintiffs' Counsel submit that this method of distributing settlement funds is fair, reasonable, and adequate, and warrants this Court's approval. *See, e.g.*, *Maxar* at *5 (approving plan of allocation based on *pro rata* distribution of recognized losses); *Crocs*,

306 F.R.D. at 692 (approving plan of allocation in securities class action settlement where funds will be allocated "pro rata" based on similar factors and plaintiffs "consulted with damages experts"). Notably, there have been no objections to the Plan of Allocation to date, which further supports its merit at final approval. *Crocs*, 306 F.R.D. at 691 ("The reaction of the class members further supports the conclusion that the Settlement Agreement is fair.").

VII. CONCLUSION

For the reasons set forth above and in the accompanying declarations, Plaintiffs respectfully request that the Court: (i) approve the proposed Settlement as fair, reasonable, and adequate; and (ii) approve the Plan of Allocation as fair and reasonable.

DATED: October 4, 2024

Respectfully submitted,

ROBBINS GELLER RUDMAN
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CERTIFICATE OF SERVICE

I hereby certify that on October 4, 2024, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send notification of such filing to the e-mail addresses denoted on the Court's Electronic Mail Notice List.

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