UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

YAO-YI LIU, TUNG-HUNG HSIEH, and CHIU-PAO TSAI, Individually and on Behalf of All Others Similarly Situated,

Plaintiffs,

vs.

WILMINGTON TRUST COMPANY, and WILMINGTON TRUST, NATIONAL ASSOCIATION,

Defendants.

NOTICE OF MOTION

Civil No. 6:14-cv-06631-EAW-MJP

PLEASE TAKE NOTICE, that upon the annexed Declaration of the undersigned counsel, Paul J. Scarlato, dated January 9, 2023, together with Exhibits 1 through 7 and the accompanying Memorandum of Law in support of Plaintiffs' Motion for Final Approval of Settlement, and upon all of the pleadings and proceedings herein, Plaintiffs, by and through their undersigned attorneys, move this Court under Fed. Civ. P. 23(e)(2) for an Order granting final approval of class action settlement.

Dated: January 9, 2023

Respectfully submitted,
/s/ Paul J. Scarlato

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vs. Civil No. 6:14-cv-06631-EAW-MJP

WILMINGTON TRUST COMPANY, and WILMINGTON TRUST, NATIONAL ASSOCIATION,

Defendants.

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

Dated: January 9, 2023

Respectfully submitted,
/s/ Paul J. Scarlato
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Plaintiffs Yao-Yi Liu, Tung-Hung Hsieh, and Chiu-Pao Tsai, certified preliminarily by the Court on October 11, 2022 (ECF 240) as Class Representatives for the Settlement Class (the "Plaintiffs" or "Class Representatives"), by and through the law firm of Rosca Scarlato LLC, preliminarily appointed Class Counsel for the Settlement Class (ECF 240), respectfully submit this memorandum in support of the Plaintiffs' unopposed motion for final: (i) approval of the proposed settlement (the "Settlement") of the above-captioned class action (the "Action") on the terms and conditions set forth in the Stipulation and Agreement of Settlement, dated August 12, 2022 (the "Stipulation"); (ii) approval of the proposed Plan of Allocation for distribution of the Net Settlement Fund; and (iii) certification of the Settlement Class.[1]

I. PRELIMINARY STATEMENT

As appointed Class Representatives, Plaintiffs presented the proposed Settlement (the "Settlement") with defendants Wilmington Trust Co. and Wilmington Trust, N.A. (collectively, the "Wilmington" or "Defendants") in support of their Motion for Preliminary Approval of Settlement, filed on August 12, 2022. (ECF 238-39). Plaintiffs' Motion for Preliminary Approval of Settlement was granted on October 11, 2022. (ECF 240). If approved pursuant to Federal Rule of Civil Procedure 23, as requested, the Settlement will resolve, conclusively and on a class-wide basis, the Action now pending before the Court. The Settlement, if approved, would release all claims pleaded by the Class Representatives. The Settlement should receive final approval from this Court in large part because

[1] Unless otherwise noted, capitalized terms have the meanings ascribed to them in the Stipulation and Agreement of Settlement, dated August 12, 2022 (the "Stipulation") (ECF No. 239, Ex. 1). Citations to "¶" in this memorandum refer to paragraphs of the Declaration of Paul J. Scarlato. in Support of Plaintiffs' Motion for Final Approval of Class Action Settlement and Plan of Allocation and Class Counsel's Motion for Award of Attorney's Fees, Payment of Expenses and For Service Awards (the "Scarlato Declaration" or "Scarlato Decl."), filed herewith, unless otherwise noted. All exhibits are annexed to the Scarlato Declaration. For clarity, citations to exhibits that themselves have attached exhibits will be referenced as "Ex. ___ - ___." The first numerical reference is to the designation of the entire exhibit attached to the Scarlato Declaration; the second reference is to the exhibit designation within the exhibit itself.

it provides substantial relief to the Class in what has been highly-contested litigation spanning nearly a decade.

Plaintiffs herein have simultaneously moved for an award of Attorneys' Fees, payment of Litigation Expenses, and for Service Awards by separate motion. The Court Ordered that any objections to the Settlement must be served upon Class Counsel and Defendants' counsel, and filed with the Court on a date not less than twenty-one (21) days prior to the scheduled Fairness Hearing, which is scheduled for 2:30 p.m. on February 13, 2023. That no Settlement Class Member has lodged an objection to date regarding the terms and conditions of the Settlement underscores its genuine fairness and propriety, which weighs in favor of its final approval by the Court. For the bases set herein, Plaintiffs respectfully request final approval to the Settlement.

II. BACKGROUND

A. Procedural history and Class Counsel investigation

Plaintiff Class Representatives were investors in certain securities offerings offered and sold by California-based Velocity Investment Group, Inc. ("Velocity"), known commonly as the "Bio Profit Funds." Velocity, managed by non-party Michael Wang, offered and sold unregistered promissory notes in the Bio Profit Funds consisting of BPS I, BPS II, BPS III, BPS V, and Velocity Valley & Grand. The Plaintiffs alleged that Bio Profit was in fact a Ponzi scheme (the "Bio Profit Scheme") whereby Bio Profit Fund investors were purportedly investing in real estate loans, when all or some of the new investors' investments in at least one of the Bio Profit Funds was being used to make "interest payments" and "redemption payments" to existing investors.

This Action has been litigated extensively over the past eight years. Plaintiffs filed a class action complaint on November 11, 2014 against Wilmington, alleging that Wilmington served as escrow agent and custodian for each of the BPS Funds. (ECF 1). Plaintiffs' complaint alleged that Wilmington assisted the Bio Profit Scheme knowingly and asserted claims for: 1) aiding and abetting

fraud; 2) aiding and abetting conversion; 3) aiding and abetting breach of fiduciary duty; 4) breach of fiduciary duty; and 5) gross negligence. *Id.* The Defendants moved to dismiss Plaintiffs' Complaint (ECF 15), and Plaintiffs filed an Amended Complaint in response thereto. (ECF 16).

Wilmington again moved to dismiss the Amended Complaint (ECF 19), and after comprehensive briefing[2] and oral argument (ECF 37), the Court denied that motion in part as to Plaintiffs' aiding and abetting a breach of fiduciary duty, gross negligence, and breach of fiduciary duty claims, and dismissed Plaintiffs' claims for aiding and abetting fraud, and aiding and abetting conversion. (ECF 45). Wilmington filed an Answer on October 23, 2017, denying all allegations asserted in the Amended Complaint (ECF 46), filed an Amended Answer on November 13, 2017, (ECF 50), and filed a Second Amended Answer on February 16, 2018. ECF 61.

The parties held a one-day mediation on November 15, 2017, as part of the Court's Alternative Dispute Resolution Plan (ECF 43), but did not settle the dispute. (ECF 52). The parties then engaged in extensive and protracted discovery which was hard fought and hotly contested. The parties exchanged hundreds of thousands of document pages; Plaintiffs produced documents related to Bio Profit investments, insurance policies, real estate ownership, banking records, and various other investments; Wilmington produced documents regarding its interaction with investors in and perpetrators of the Bio Profit Scheme, banking and custodial services it provided to Velocity and Bio Profit Funds, its due diligence activities, anti-money laundering and/or "know your customer" inquiries about Bio Profit/Velocity and/or their investment programs, its monitoring of the Bio Profit/Velocity accounts, its policies, processes, and procedures for trust services, escrow accounts, account set-up practices and authorization procedures, and fraud monitoring.

In order to obtain the requested discovery, the parties filed numerous contested motions requiring extensive briefing and judicial intervention, including: Plaintiffs' motion to compel

[2] *See* ECF 19, 24, 26, 28, 31, 32-36, and 38-40.

Wilmington to produce documents regarding its other business dealings with the Bio Profit Scheme perpetrators, documents it produced to the SEC, and documents relating to all transactions connected to the Bio Profit accounts (ECF 74-75, 83-84); Defendants' motion for a protective order relating to Plaintiffs' notice of deposition pursuant to Fed. R. Civ. P. 30(b)(6) (ECF 85); Defendants' motion to compel additional documents from Plaintiffs (ECF 86-89); Plaintiffs' motion to compel documents from additional custodians (ECF 104-06); Plaintiffs' motion to compel Wilmington's document retention policies and document preservation materials (ECF 122-24); Plaintiffs' motion to compel documents related to Wilmington's policies and procedures withheld pursuant to the Suspicious Activity Report ("SAR") privilege (ECF 145-47); Plaintiffs' motion to compel documents on behalf of other custodians, and for leave to take more than ten depositions (ECF 204-07); Wilmington's cross motion for a protective order (ECF 213); and Plaintiffs' motion to compel additional compliance-related documents (ECF 220-22).

The parties also engaged in many depositions. The three Class Representatives traveled from Taiwan to Buffalo for an entire week during which they were deposed by Wilmington. Plaintiffs deposed eight Wilmington witnesses in Delaware and New York. In addition to the aforementioned discovery activities, the parties received non-party discovery consisting of several hundred thousand pages produced by the court-appointed Receiver in the action captioned *Securities and Exchange Commission v. Yin Nan "Michael" Wang, et al.*, Case No. CV 13-7553 (C.D. Cal. Oct. 15, 2013) (the "SEC Action"), and Plaintiffs traveled to San Diego to depose the Receiver. As a result of these activities, the parties possess a thorough understanding of the respective strengths and weaknesses of their cases.

B. Extensive negotiation produced the Settlement

The parties made multiple attempts to compromise the Action with the assistance of experienced mediators. The parties first traveled to Rochester, New York, to participate in an in-

person mediation of this matter on November 15, 2017 before A. Vincent Buzard, Esquire, pursuant to the Court's Order and its Alternative Dispute Resolution Plan. (ECF 52). Prior to that mediation, the parties prepared detailed position statements identifying the strengths and addressing potential weaknesses in their cases and submitted those statements to the mediator. The first mediation did not result in compromise and the parties continued the discovery efforts in earnest.

After discovery was approaching completion, the parties participated in an all-day arm's length mediation in New York City on February 13, 2020, before mediator Michael D. Young of JAMS. Prior to the February 2020 mediation, the parties again prepared detailed mediation statements incorporating the new evidence and information obtained through the considerable discovery conducted after the first mediation, identifying the strengths and addressing potential weaknesses in their respective cases, supported by documents and testimony, exchanged those statements and exhibits with each other, and submitted them to the mediator. Again, the parties were unable to achieve a negotiated resolution. The parties then resumed their discovery activities.

The Court then issued an Order on March 23, 2021 which directed the parties to participate in a settlement conference supervised by the Hon. Mark W. Pederson. (ECF 199). The parties participated in that conference on April 30, 2021 (ECF 203), but did not resolve the Action at that time and again resumed their discovery activities.

The parties then re-engaged the JAMS mediator, Mr. Young, in late 2021, and resumed the lengthy settlement dialog. Based upon the parties' extensive discovery activities, thorough investigation, and careful evaluation of the available facts and governing law relating to the pleaded matters, the multiple mediation sessions, the additional negotiations supervised by Judge Pederson, followed by the subsequent negotiations facilitated by Mr. Young, the parties achieved a negotiated compromise and settled the Action in principle, pursuant to the memorialized provisions of the Stipulation.

This motion seeks the Court's final approval of that Settlement, which in pertinent part calls for Wilmington to pay the lump sum of $4,350,000 into a Settlement Fund for the benefit of the Settlement Class. If approved, the Settlement Fund will be used to satisfy Settlement Class Member claims, costs, and expenses related to Class Notice and for the implementation and administration of the Settlement, Attorneys' Fees and Expenses for Class Counsel, as well as Service Awards for the Class Representatives.

III. SUMMARY OF THE SETTLEMENT

A. The Class

The Court issued a Decision and Order on October 11, 2022, resolving Plaintiffs' Motion for Preliminary Approval, and defining the Settlement Class in this Action (the "Class") pursuant to Fed. R. Civ. P. Rule 23(b)(2), as follows: "all persons and entities who invested in the Bio Profit Scheme and were damaged thereby. Excluded from the Settlement Class are (i) Defendants; (ii) any person who was an officer or director of Defendants; (iii) any firm or entity in which any Defendants have or had a controlling interest; (iv) the parents or subsidiaries of Defendants; (v) the legal representatives, agents, heirs, beneficiaries, successors-in-interest, or assigns of any excluded person or entity, in their respective capacity as such; and (vi) any persons or entities who or which exclude themselves by submitting a valid request for exclusion in accordance with the requirements set forth below and in the Notice." (ECF 240).

B. Benefit to the Class

Members of the Class purchased securities (unsecured promissory notes) at issue in the Action through several unregistered offerings tracing back to at least June 2005. The Action was commenced in 2014. Now, almost two decades after the origins of the disputed transactions, the investors who comprise the Class are potentially at the cusp of mitigating some of their economic injuries from long ago based on the "Recognized Loss Amount" method set forth in the Settlement,

with distributions to be allocated among all Authorized Claimants, also as provided in the Settlement. The "Settlement Amount" is defined as four million and three hundred fifty thousand U.S. dollars ($4,350,000) in cash, paid into escrow by the Wilmington Defendants, which, if approved, shall constitute the "Net Settlement Fund" from which distributions will be made to Class Members who follow the agreed upon administrative procedures.

C. Releases

As agreed upon between the parties in the Settlement, "Payment according to this Plan of Allocation will be deemed conclusive against all Authorized Claimants." (ECF 239 Ex. 1, at ¶ 68, p. 23). The Stipulation makes clear that "subject to approval by the Court pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, that, in consideration of the benefits flowing to the Parties hereto, all Released Claims and all Released Defendants' Claims, as against all Released Parties, shall be fully, finally, and forever compromised, settled, released, discharged, and dismissed with prejudice, and without costs, upon and subject to the" Settlement terms and conditions. (*Id*. at p. 5). The Stipulation further provides that "[n]o person shall have any claim against Plaintiffs, Plaintiffs' Counsel, Defendants, Defendants' respective counsel, the Claims Administrator, or any agent designated by Class Counsel, arising from determinations or distributions to claimants made substantially in accordance with the Stipulation, the Plan of Allocation approved by the Court, or further orders of the Court." (*Id*. at ¶ 70, p. 24).

D. Objections

The Court's October 11, 2022 Order granting Plaintiffs' Motion for Preliminary Approval (ECF 240) sets forth the procedures under which any Class Member(s) could raise objections to the Settlement, the Plan of Allocation, and/or the application for an award of attorneys' fees or expenses "only if such Settlement Class Member has served by hand or by mail his, her, or its written objection and supporting papers, such that they are received on or before twenty-one (21) calendar

days before the February 13, 2023 Settlement Hearing,[3] upon Class Counsel: Alan Rosca and Paul Scarlato, Rosca Scarlato, LLC, 161 Washington Street, Suite 1025, Conshohocken, PA 19428; and Defendant's Counsel Representative: Melissa N. Subjeck, Hodgson Russ LLP, 140 Pearl Street, Buffalo, NY 14202; and has filed said objections and supporting papers with the Clerk of the Court, United States District Court, 100 State Street, Rochester, NY 14614. Any Settlement Class Member who does not make his, her, or its objection in the manner provided for in the Notice shall be deemed to have waived such objection and shall forever be foreclosed from making any objection to any aspect of the Settlement, to the Plan of Allocation, or to the request for attorneys' fees and expenses, and Service Award unless otherwise ordered by the Court, but shall otherwise be bound by the Judgment to be entered and the releases to be given." (*See* ECF 240; Scarlato Dec. Exhibit 4). To date, no Class Member has objected to the proposed Settlement.

E. Attorneys' Fees, Litigation Costs, and Class Representatives' Service Awards

Plaintiffs have moved separately for Court approval of attorneys' fees, litigation costs, and Class Representative Plaintiffs' Service Awards, pursuant to a motion that is being filed concomitantly with this motion.

IV. ARGUMENT

A. The Court should grant final approval of the class action Settlement.

Rule 23(e) of the Federal Rules of Civil Procedure requires judicial approval of any class

[3] *See* ECF 241-42, enlarging the time for submission of papers in advance of the final fairness hearing:

> TEXT ORDER granting [ECF] 241 Letter Request for Extension of Time. The final fairness hearing currently scheduled for January 11, 2023, at 2:00 p.m. is rescheduled for February 13, 2023, at 2:30 p.m. at the United States Courthouse, 100 State Street, Rochester, New York 14614. The other deadlines set forth in the Court's Order granting preliminary approval of the class action settlement (Dkt. 240) that are measured from the date of the final fairness hearing are extended accordingly. As set forth in the parties' letter request, Plaintiffs are instructed to publish notice of the new dates on the case specific website of the Settlement Administrator and to notify by email those class members for whom the Settlement Administrator has email addresses.

action settlement. When considering a class action settlement for approval, the court must "carefully scrutinize the settlement to ensure its fairness, adequacy and reasonableness, and that it was not a product of collusion." *D'Amato v. Deutsche Bank*, 236 F.3d 78, 85 (2d Cir. 2001) (citation omitted). Courts must consider "both the settlement's terms and the negotiating process leading to the settlement." *Wal-Mart Stores, Inc. v. Visa U.S.A.*, 396 F.3d 96, 116 (2d Cir. 2005).

Rule 23(e)(2) of the Federal Rules of Civil Procedure provides a list of factors for the Court to consider to determine if a proposed settlement is "fair, reasonable and adequate." Fed. R. Civ. P. 23(e)(2). The Court's evaluation, based on those factors, should determine the following:

> (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 the proposal treats class members equitably relative to each other; and
>
> (D) the proposal treats class members equitably relative to each other.

Id.

As the Advisory Committee's note to the 2018 amendment of Rule 23 explains, subsections (A) and (B) focus on the "procedural" fairness of a settlement and subsections (C) and (D) focus on the "substantive" fairness of the settlement. (*See* Fed. R. Civ. P. 23(e)(2) advisory committee's note to 2018 amendments). These factors are similar to the "procedural" and "substantive" factors the Second Circuit developed prior to the amendment. *See Charron v. Wiener*, 731 F.3d 241, 247 (2d Cir. 2013) (explaining that courts evaluate procedural and substantive fairness of a class settlement). The 2018 amendment, however, recognizes that "[t]he sheer number of factors" considered in various

Circuits "can distract both the court and the parties from the central concerns that bear on review under Rule 23(e)(2)." (Fed. R. Civ. P. 23(e)(2) advisory committee's note to 2018 amendments). The 2018 Amendment "directs the parties to present the settlement to the court in terms of a shorter list of core concerns, by focusing on the primary procedural considerations and substantive qualities that should always matter to the decision whether to approve the proposal." *Id.*

1. The Class Representative Plaintiffs and Class Counsel have adequately represented the Class.

The Class Representative Plaintiffs and Class Counsel have adequately represented the Class (Fed. R. Civ. P. 23(e)(2)(A)). Class Counsel possess extensive experience in class action litigation generally, and with investment-loss class action litigation in particular. (Scarlato Dec. at ¶ 98). Indeed, the Rosca Scarlato attorneys are among a very small number of lawyers across the country that have developed a practice in pursuing claims against banks arising out of their roles in Ponzi schemes, on behalf of victimized investors, an area of the law that requires extensive knowledge of the compliance and anti-money laundering rules and regulations applicable to banks in the context of their oversight and operations as to accounts that handle investor money, and the legal standards applicable to a bank's actions when conducting transactions involving investor money through their accounts. See *id*., summarizing other cases where the Rosca Scarlato lawyers represent victimized investors in class actions against banks, arising out of those banks' roles in certain other Ponzi schemes. Class Counsel's collective expertise positioned them to build a compelling case, with development of evidence regarding Defendants' prospective liability. (*Id.* at ¶¶ 12, 46, 85-86). Without their persistence, expertise, and willingness to invest substantial time and financial resources in this matter spanning nearly a decade, the Class would have been left without remedy.

Class Counsel engaged in extensive written and oral advocacy on the claims, resulting in, *inter alia*, this Court's (partial) denial of Defendants' motion to dismiss. (*Id.* at ¶ 23). Class Counsel pursued discovery of relevant evidence zealously, obtaining hundreds of thousands of pages of

documents and electronic files through requests for production served on Defendants and subpoenas served on third parties, and then organized and reviewed this massive amount of information using document review platforms. (*Id.* at ¶¶ 23-33). Class Counsel conducted depositions of current and former Wilmington employees, as well as a Fed. R. Civ. P. 30(b)(6) examination of Wilmington and non-parties. (*Id.* at ¶ 35). The results of Class Counsel's significant experience in this type of litigation and duly diligent efforts culminated in the Settlement that provides for partial recovery of investment losses where none would have otherwise been realized. (*Id.* at ¶¶ 58-62).

The Class Representatives responded to written discovery requests timely and produced hundreds of pages of documents, involving completion of additional document searches and participating in multiple phone calls or in-person meetings with Class Counsel. (*Id.* at ¶ 81). Each of the Class Representatives also sat for full day depositions, having traveled halfway around the world from Taiwan to be deposed in person in Buffalo, NY. (*Id.* at ¶ 36). The Class Representatives remained available to Class Counsel throughout the multiple negotiations, and reviewed the Settlement thoroughly and approved it. (*Id.* at ¶¶ 81, 110).

The Class Representatives and Class Counsel "have obtained 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.*, No. 02 CIV. 5575 (SWK), 2006 WL 903236, at *10 (S.D.N.Y. Apr. 6, 2006); *In re Warner Comm. Sec. Litig.*, 618 F. Supp. 735, 745 (S.D.N.Y. 1985), *aff'd*, 798 F.2d 35 (2d Cir. 1986) (approving settlement where "[d]iscovery is fairly advanced and the parties certainly have a clear view of the strengths and weaknesses of their cases"); *Millien v. Madison Square Garden Co.*, No. 17-CV-4000 (AJN), 2020 WL 4572678, at *5 (S.D.N.Y. Aug. 7, 2020). Accordingly, Class Counsel and the Class Representatives have represented the Class adequately throughout the Action. Fed. R. Civ. P. 23(e)(2)(A).

2. The arm's length negotiated Settlement was achieved with the assistance of experienced mediators.

The Settlement is the product of hard-fought, arm's-length negotiations stretching over a period of a few years, with the assistance of very experienced and well-respected neutrals, A. Vincent Buzard, Esq., and Michael D. Young of JAMS, as well as a judicially-supervised settlement conference overseen by Judge Pederson. *See* Fed. R. Civ. P. 23(e)(2)(B). "To determine procedural fairness, courts examine the negotiating process leading to the settlement." *Morris v. Affinity Health Plan, Inc.*, 859 F. Supp. 2d 611, 618 (S.D.N.Y. 2012). "A 'presumption of fairness, adequacy, and reasonableness may attach to a class settlement reached in arm's-length negotiations between experienced, capable counsel after meaningful discovery.'" *Wal-Mart Stores, Inc.*, 396 F.3d at 116 (quoting Manual for Complex Litig. (Third) § 30.42 (1995)). Moreover, in such circumstances, "great weight is accorded to the recommendations of counsel, who are most closely acquainted with the facts of the underlying litigation." *In re PaineWebber Ltd. P'ships Litig.*, 171 F.R.D. 104, 125 (S.D.N.Y. Mar. 20, 1997); *see also Clark v. Ecolab Inc.*, Nos. 07 Civ. 8623, 04 Civ. 4488, 06 Civ. 5672, 2010 WL 1948198, at *4 (S.D.N.Y. May 11, 2010) ("In evaluating the settlement, the Court should keep in mind the unique ability of class and defense counsel to assess the potential risks and rewards of litigation"). Class Counsel, who have extensive experience litigating and settling class actions, including class actions against banks on behalf of victims of Ponzi schemes, are of the opinion that the Settlement is a desirable result for the Settlement Class under the circumstances. (Scarlato Dec. at ¶¶ 3-7, 83-84). Accordingly, this Settlement was negotiated at arm's length and was procedurally fair. *See* Fed. R. Civ. P. 23(e)(2)(B).

3. The relief provided for the Settlement Class is significant, and satisfies the relevant factors of Grinnell and Fed. R. Civ. P. Rule 23(e)

a. Settlement relief is significant

Perhaps the best indicator of the fairness of the Settlement is the significance of the relief it provides. Here, the Settlement provides class-wide relief that this Court held in its preliminary approval could be certified, which easily accords with Second Circuit authorities, and if approved would provide significant relief to the Class without further delay of this years-long litigation.

Second Circuit courts have long considered additional factors when evaluating a proposed class action Settlement, as was established in *City of Detroit v. Grinnell Corp.*, which came to be known as the "*Grinnell* factors," and which are as follows:

> (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), *abrogated on other grounds by Goldberger v. Integrated Res., Inc.*, 209 F.3d 43 (2d Cir. 2000). Not every factor must necessarily weigh in favor of settlement; "rather, the court should consider the totality of these factors in light of the particular circumstances." *Thompson v. Metro. Life Ins. Co.*, 216 F.R.D. 55, 61 (S.D.N.Y. 2003). As demonstrated herein, the Settlement readily satisfies all of the Rule 23(e)(2) and *Grinnell* factors,[4] meets the favored public policy of resolving class action claims, and warrants the Court's approval.

b. Complexity, expense, and likely duration of the Action warrants approval

The first of the *Grinnell* factors, namely, the complexity, expense, and likely duration of the litigation certainly warrants approval. As noted, the Action was commenced more than eight years ago in November 2014 and has been litigated aggressively by both sides throughout that time period. The expense of the litigation would not possibly have been justifiable for any individual plaintiff to pursue, absent the use of class action litigation. The complexity of the issues in the Action is

[4] The factors set forth in Fed. R. Civ. P. Rule 23(e)(2) were intended "to add to, rather than displace, the *Grinnell* factors." *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig*., 330 F.R.D. 11, 29 (E.D.N.Y. 2019). *See* Advisory Committee Notes to 2018 Amendments to Rule 23 (noting that the Rule 23(e)(2) factors are not intended to "displace" any factor previously adopted by the Court of Appeals). Accordingly, Plaintiffs will discuss both the factors set forth in Rule 23(e)(2) and the non-duplicative *Grinnell* factors.

underscored by the extent of the discovery activities detailed above. (*See generally* Scarlato Decl.). And, this settlement comes at a juncture in the case where, had a resolution not been reached, Plaintiffs would have incurred substantial case expenses going forward, in the form of large expert fees and substantial trial expenses. Particularly as to expert fees, in this narrow area of the law involving the anti-money laundering and compliance rules, regulations and practices applicable to banks that handle the types of accounts involved here, expert fees all the way to trial would very likely be at least in the six-figures, given that the experts with the kind of knowledge required here tend to be former senior state and federal bank regulators.

c. Class Representatives embrace the Settlement

The reaction of the class to the settlement has been decidedly favorable, and the Class Representatives have been closely connected to and involved in the entire process of the litigation and the negotiation activities described above. *Id.* The Class Representatives also agreed enthusiastically with the opinion of Class Counsel that the Settlement constitutes a positive outcome of the Action and provides a remedy where none would have otherwise existed for the injured Bio Profit Fund investors.

d. The stage of the proceedings and substantial discovery completed favor final approval

The advanced stage of the proceedings and the amount of discovery completed also favors Settlement approval. As detailed above, the parties participated in extensive discovery in the Action, spanning more than eight years, and resulting in production and review of hundreds of thousands of documents and many hours of testimony. The advanced stage of the Action following nearly exhaustive pre-trial activity, further supports the Motion and relief requested. The stage of the Action supports approval of the Settlement.

Under that *Grinnell* factor, settlement is especially favored when the litigation is at an "advanced stage" with an "extensive amount of discovery completed." *In re Marsh & McLennan*

Cos. Sec. Litig., No. 04 Civ. 8144, 2009 WL 5178546, at *6 (S.D.N.Y. Dec. 23, 2009). This factor goes to "whether the parties had adequate information about their claims, the strengths of the defenses asserted by defendants, and the value of plaintiffs' causes of action for purposes of settlement." *In re Facebook IPO Sec. & Derivative Litig.*, MDL No. 12-2389, 2015 WL 6971424, at *4 (S.D.N.Y. Nov. 9, 2015); *see also In re Warner Comms. Sec. Litig.*, 618 F. Supp. 735, 745 (S.D.N.Y. 1985), *aff'd*, 798 F.2d 35 (2d Cir. 1986) (approving settlement where "[d]iscovery is fairly advanced and the parties certainly have a clear view of the strengths and weaknesses of their cases").

As a result of the many years of litigating the Action, including the completion of class discovery and significant merits discovery against the Settling Defendants, the parties are well aware of the relative strengths and weaknesses of various claims and defenses. Class Counsel therefore possesses the requisite information to make an informed decision about the benefits of continued litigation versus compromising the Action and "developed an informed basis from which to negotiate a reasonable compromise." *In re Global Crossing Sec. and ERISA Litig.*, 225 F.R.D. at 459. The Plaintiffs submit this factor strongly supports final Settlement approval.

e. Risks of maintaining the Action, including establishment of liability and damages, are significant and justify the Settlement.

Regarding the risks of maintaining the class action through trial, and of establishing liability and damages, the lack of certainty in establishing liability and damages to the satisfaction of a fact-finder at trial is a persistent risk an approved Settlement would avoid. The Class Representatives approved the Settlement while mindful of that risk and determined it served their individual and collective best interests to accept the Settlement as a final and conclusive outcome of the Action, further demonstrating that Court approval of the Settlement is reasonable, necessary, and appropriate.

f. Ability of the Defendants to withstand a larger judgment amount

While the ability of Wilmington to withstand a greater judgment amount may not be as favorable as the other *Grinnell* factors, the Defendants have litigated the Action with almost a decade of determination and as one might expect, disavow any culpability whatsoever in the Settlement. Continuing the Action to trial might possibly result in a larger award than the Net Settlement Fund, but the risk of not establishing liability and/or damages to the satisfaction of the fact-finder is one the Class Representatives determined was not a risk worth taking.

g. Risks and the range of Settlement reasonableness versus best possible recovery

The range of reasonableness of the Settlement in light of the best possible recovery, following almost a decade of spirited litigation, hews in favor of approval if past is prologue. The Wilmington Defendants defended themselves aggressively and the efforts and all the attendant risks of litigation that would be manifest with any attempt to achieve the best possible recovery strongly supports Court approval.

The Settlement is even more significant when considered against the substantial costs, risks, and delays of continued litigation. *See* Fed. R. Civ. P. 23(e)(2)(C)(i). The relief provided by the Settlement is concrete, guaranteed, and immediate, while the results from continued litigation against the Defendants would be delayed at best and could potentially end up with no recovery at worst. Without this Settlement, it could be several years before the benefits afforded to the Class under this Settlement could be realized after trial.

Defendants are sophisticated and well-funded opponents with the resources to defend the claims through trial and potentially multiple appeals. There is little if any doubt that continued litigation against the Defendants could span years and be costly to the parties and a tax on scarce judicial resources. Defeating summary judgment, achieving a litigated verdict at trial, and sustaining any such verdict through the appeals process is a prolonged, complex, and risky proposition that would require significant additional time and expense. *See In re IPO*, 671 F. Supp. 2d 467, 481

(S.D.N.Y. 2009) (finding that the complexity, expense, and duration of continued litigation supports approval where, among other things, "motions would be filed raising every possible kind of pre-trial, trial and post-trial issue conceivable"). The substantial risk of continued litigation weighs in favor of approving the Settlement. *In re Global Crossing Securities and ERISA Litig.*, 225 F.R.D. 436, 459 (S.D.N.Y. 2004).

Apart from substantial risk and expense, courts overwhelmingly recognize that the delay of resolution of the litigation by itself is a significant consideration when approving a settlement. As the Court explained in *Strougo ex rel. Brazilian Equity Fund, Inc. v. Bassini*, 258 F. Supp. 2d 254, 261 (S.D.N.Y. 2003), "even if a [plaintiff] or class member was willing to assume all the risks of pursuing the actions through further litigation . . . the passage of time would introduce yet more risks . . . and would in light of the time value of money, make future recoveries less valuable than this current recovery." Inevitable litigation delays "not just at the trial stage, but through post-trial motions and the appellate process, would cause Settlement Class Members to wait years for any recovery, further reducing its value." *Maley v. Del Global Techs. Corp.*, 186 F. Supp. 2d 358, 362 (S.D.N.Y. 2002) (citing *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 467 (2d Cir. 1974)); *see also In re Marsh & McLennan*, *Cos. Sec. Litig.*, No. 04 Civ. 8144(CM), 2009 WL 5178546, at *5 (S.D.N.Y. Dec. 23, 2009) (noting the additional expense and uncertainty of "inevitable appeals" and the benefit of Settlement, which "provides certain and substantial recompense to the Class members now"); *Lipuma v. Am. Express Co.*, 406 F. Supp. 2d 1298, 1322 (S.D. Fla. 2005) (likelihood that appellate proceedings could delay class recovery "strongly favor[s]" approval of a settlement); *Cardiology Assocs., P.C. v. Nat'l Intergroup, Inc.*, No. 85 CIV. 3048 (JMW), 1987 WL 7030, at *3 (S.D.N.Y. Feb. 13, 1987) ("[E]ven assuming a favorable jury verdict, if the matter is fully litigated and appealed, any recovery would be years away").

The relief provided under the Settlement readily falls within the range of reasonable results

given the complexity of the case and the significant barriers that stand between today and a final, implemented judgment. *Nobles v. MBNA Corp.*, No. C 06-3723 CRB, 2009 WL 1854965, at *2 (N.D. Cal. June 29, 2009) ("The risks and certainty of recovery in continued litigation are factors for the Court to balance in determining whether the Settlement is fair."); Fed. R. Civ. P. 23(e)(2)(C)(i). This too weighs heavily in favor of final Settlement approval.

h. Side agreement disclosure

Rule 23(e)(2)(C)(iv) requires the Court to consider any side agreements that must be disclosed under Rule 23(e)(3) because the existence of side agreements may result in inequitable treatment of class members. *See* Civ. R. 23(C) advisory committee's note to 2018 amendments. Here, there is no side agreement. The Settlement before the Court is the only existing agreement.

4. The Settlement treats Class Members equitably relative to each other.

The Court must also consider whether the Settlement treats Settlement Class Members equitably relative to one another. *See* Civ. R. 23(e)(2)(D). Here, the Settlement treats Settlement Class Members equally because the relief benefits all Class Members in an identical albeit proportional manner. *Meredith Corp. v. SESAC, LLC*, 87 F. Supp. 3d 650, 660 (S.D.N.Y. 2015) (approving settlement of a Rule 23(b)(2) class where a licensing scheme was directed at all members of the proposed class and contemplated settlement provides relief to protect each member of the proposed settlement class).

5. The lack of objections supports final approval.

"It is well-settled that the reaction of the class to the settlement is perhaps the most significant factor to be weighed in considering its adequacy." *Maley*, 186 F. Supp. 2d at 362. Here, "[t]he fact that the vast majority of class members neither objected nor opted out is a strong indication that the proposed settlement is fair, reasonable, and adequate." *Wright v. Stern*, 553 F. Supp. 2d 337, 345 (S.D.N.Y. 2008).

The deadline for filing of an objection is January 23, 2023, and no objections have been filed as of the date of this Motion. (Scarlato Dec. ¶ 2, 71). The lack of even a single objection at this stage strongly suggests the reaction of Class Members is positive. *See In re Merrill Lynch & Co., Inc. Research Reports Sec. Litig.*, 246 F.R.D. 156, 167 (S.D.N.Y. 2007) (11 objections out of 1.8 million mailed notices reflected "overwhelmingly positive reaction of the class . . . weigh[ing] heavily in favor of approval of the Settlement"). The clearly positive reaction of the Class to the Settlement weighs heavily in favor of final approval.

B. The Court should order the class to be finally certified for settlement purposes.

Plaintiffs submitted the proposed Settlement to the Court for preliminary approval on August 12, 2022, and requested by motion, for Settlement purposes only, that the Court preliminarily certify the Settlement Class under Fed. R. Civ. P. 23(b)(1) ECF 238. Therein, and within the Scarlato Declaration, submitted on even date [ECF 239], Plaintiffs articulated how the proposed Class satisfied the Rule 23 requirements.

The Court granted the motion and issued its Preliminary Class Certification Order on October 11, 2022 ("Preliminary Class Order"), which preliminarily certified the Class for Settlement purposes. ECF 240. The Court made findings that the class action certification prerequisites found at Rules 23(a) and 23(b)(3) of the Federal Rules of Civil Procedures were satisfied, because: (a) the members of the Settlement Class are so numerous that joinder of all Settlement Class Members is impracticable; (b) questions of law and fact common to the Settlement Class Members exist; (c) the Class Representatives' claims are typical of the Settlement Class' claims; (d) Class Representatives and Class Counsel have fairly and adequately represented and protected the interests of the Settlement Class; (e) the questions of law and fact common to Settlement Class Members predominate over any individual questions; and (f) a class action is superior to other available methods for the fair and efficient adjudication of the controversy. ECF 240.

The Court also preliminarily certified Yao-Yi Liu, Tung-Hung Hsieh, and Chiu-Pao Tsai as Class Representatives for the Settlement Class, and appointed the law firm of Rosca Scarlato, LLC as Class Counsel for the Settlement Class, and approved the form, substance and requirements of the Notice of Pendency of Class Action, Proposed Settlement, and Motion for Attorneys' Fees and Expenses (the "Notice") and the Proof of Claim and Release form ("Proof of Claim"), substantially in the forms submitted to the Court. ECF 239-40.

The Court also approved Plaintiffs' retention of Strategic Claims Services ("SCS") as the Claims Administrator and directed SCS to mail Notice and the Proof of Claim, by first-class mail, postage prepaid, on or before thirty (30) days after entry of the Preliminary Class Order to all Settlement Class Members who could be identified with reasonable effort. The Parties (and SCS) have complied with the Court's Preliminary Class Order, including providing notice to the Class as directed. Scarlato Decl. ¶ 64-70.

Nothing has changed to alter the propriety of the Court's preliminary certification, and to date no Class Member has objected to the Class certification. Therefore, for all the reasons stated below, and in Plaintiff's Preliminary Class Motion, [ECF Nos. 238-39] which is incorporated herein by reference, as well as findings in the Court's Preliminary Class Order [ECF No. 240], Plaintiff respectfully requests that the Court reaffirm its determinations and finally certify the Class for purposes of effecting the Settlement pursuant to Fed. R. Civ. P. 23(b)(1).

C. The plan of allocation for the proceeds of the Settlement 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 with a "rational basis" satisfies this requirement. *In re FLAG Telecom Holdings, Ltd. Sec. Litig.*, No. 02-cv-3400, 2010 WL 4537550, at *21 (S.D.N.Y. Nov. 8, 2010); *In re Initial Pub. Offering Sec. Litig.*, 671 F. Supp. 2d at 497.

Here, the proposed Plan provides a fair and reasonable method to allocate the Net Settlement Fund among Settlement Class Members who submit valid claims. The Plan is set forth in full in the Notice. *See* Ex. 4. The Plan provides for distribution of the Net Settlement Fund among Authorized Claimants on a *pro rata* basis based on their "Recognized Claim" for out-of-pocket losses determined based on the amount of money invested in the Bio Profit Funds, less any amounts received as interest or return of principal. See Scarlato Decl. ¶74.

The sum of a claimant's Recognized Loss Amounts will be the claimant's "Recognized Claim." If the aggregate amount of Recognized Claims is greater than the Net Settlement Fund, each Claimant will receive a settlement equal to their *pro rata* share of the Net Settlement Fund. *See, e.g. In re Merrill Lynch Tyco Research Sec. Litig.*, 249 F.R.D. 124, 135 (S.D.N.Y. 2008) ("A plan of allocation that calls for the pro rata distribution of settlement proceeds on the basis of investment loss is presumptively reasonable."). moreover, Class Counsel believes that the Plan of Allocation provides a fair and reasonable method to equitably allocate the Net Settlement Fund. *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"). Moreover, as noted above, to date, no objections to the proposed plan have been received. The Plan of Allocation should be approved.

D. Notice satisfied rule 23 and due process.

Class Counsel have provided the Settlement 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." *Wal-Mart Stores*, 396 F.3d at 114. Both the substance of the Notice and the method of its dissemination satisfied these standards.

As set forth in the Preliminary Approval Motion, the Notice provided all of the necessary information for Settlement Class Members to make an informed decision regarding the Settlement, the Fee and Expense Application, and the Plan of Allocation. The Notice informed Settlement Class

Members of, among other things: (i) the amount of the Settlement; (ii) the reasons why the Parties are proposing the Settlement; (iii) the estimated recovery as a percentage of maximum provable damages; (iv) the maximum amount of attorneys' fees and expenses and Service Award that will be sought; (v) the right of Settlement Class Members to object to the Settlement or seek exclusion; and (vi) the binding effect of a judgment on Settlement Class Members. *See* 15 U.S.C. § 78u-4(a)(7). The Notice also contained the Plan of Allocation and provided information about how to submit a Claim Form.

In addition, the claims administrator ("Strategic Claims Services" or "SCS") caused the Summary Notice, translated into Chinese, to be released over the internet using *Globe Newswire.* Ex. 4. SCS also has a webpage for the Settlement, www.strategicclaims.net/bioprofit to provide information about the Settlement, as well as access to copies of the Notice, the Claim Form, Stipulation, and the Preliminary Approval Order (*id*. at ¶12).

This combination of individual mail to those who could be identified with reasonable effort, email using valid email addresses provided by the broker/Nominees supplemented by internet notice, was "the best notice . . . practicable under the circumstances." Fed. R. Civ. P. 23(c)(2)(B); *see, e.g.*, *In re Marsh & McLennan Cos. Sec. Litig.*, No. 04-8144, 2009 WL 5178546, at *12-13 (S.D.N.Y. Dec. 23, 2009).

V. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court enter the proposed Final Approval Order submitted herewith, which will: (i) finally approve the Settlement; (ii) finally grant class certification; and (iii) grant any such other and further relief as may be necessary, just, and appropriate.

Dated: January 9, 2022

Respectfully submitted,

/s/ Paul J. Scarlato
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