UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

ALBERT GUTKNECHT, individually and on behalf of all others similarly situated,

Plaintiff,

v.

THE LOVESAC COMPANY, SHAWN NELSON, and DONNA DELLOMO,

Defendants.

Case No. 3:23-cv-01640-KAD

PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF UNOPPOSED MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT

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I. INTRODUCTION

Lead Plaintiff Susan Cooke Peña ("Lead Plaintiff" or "Plaintiff"), on behalf of herself and the Settlement Class,[1] respectfully submits this memorandum of law in support of her motion for final approval of the proposed settlement ("Settlement"), as set forth in the Stipulation of Settlement filed with the Court on July 31, 2024 (ECF No. 45-3).

Plaintiff proposes that the Settlement Class Members release the claims advanced in this action for $615,000, a 44.6% recovery of maximum estimated damages. The Parties reached the Settlement after arm's-length negotiations. Plaintiff and Lead Counsel scrutinized the claims she brought through an extensive investigation, drafted an amended complaint, consulted with experts, and took due-diligence discovery to confirm their understanding of the strengths and weaknesses of their case.

Plaintiff followed the Court-approved notice plan to solicit claims, requests for exclusion, and objections. As of October 28, 2024, Plaintiff has not received any requests for exclusions or objections. (The deadline for those submissions is not until November 4, 2024, so Plaintiff will provide an update on whether any requests for exclusion or objections are received after the date of this filing.) For these reasons and those set forth below, the Settlement is fair, reasonable, and adequate, and the Court should approve it.

[1] The Settlement Class consists of all persons and entities who purchased or otherwise acquired Lovesac common stock during the period from June 8, 2022, through August 16, 2023, inclusive. Excluded from the Settlement Class are Lovesac and (i) all officers and directors of Lovesac during the Class Period (including Shawn Nelson and Donna Dellomo), (ii) Lovesac's Affiliates, subsidiaries, successors, and predecessors, (iii) any entity in which Lovesac or any other Defendant has or had during the Class Period a Controlling Interest, and (iv) for the individuals identified in subpart(s) (i), (ii), and/or (iii), their Family Members, legal representatives, heirs, successors, and assigns.

Lead Counsel also consulted with an economic expert to formulate a fair, reasonable, and adequate Plan of Allocation for the Settlement Fund. The Plan of Allocation treats all claimants fairly based on the applicable law. The Court should also approve the Plan of Allocation.

II. FACTS

A. Factual Allegations

Plaintiff's Amended Class Action Complaint ("Complaint") (ECF No. 38) alleges that the Lovesac Company ("Lovesac" or "Company") restated its financial results for the fiscal year ended January 29, 2023 and the thirteen weeks ended April 30, 2023 as a result of undisclosed material weaknesses in its internal controls. The Complaint alleged that Defendants violated §§10(b) and 20(a) of the Securities Exchange Act of 1934 (the "Exchange Act") by making material misrepresentations and omissions to investors regarding Lovesac's internal controls and its financial results.

Lovesac is a direct-to-consumer specialty furniture brand that markets itself as capable of quick shipping (as compared to traditional furniture retailers). ¶19. During the Class Period, Lovesac later admitted, it improperly accounted for shipping expenses, violating GAAP. ¶¶45-47. This improper accounting treatment caused the Company to materially misstate its gross profit, operating income (loss), net income (loss), and diluted earnings per share during the Class Period. ¶49. Lovesac also improperly accounted for operating leases beginning in 2022, and failed to record a lease during the first quarter of the 2024 fiscal year. ¶¶55, 56. This improper accounting caused the Company to materially misstate its operating income (loss), net income (loss), and diluted earnings per share during the Class Period. ¶57. Additionally, Lovesac improperly recognized revenue during the Class Period by recognizing revenues on certain canceled sales orders. ¶61. When the Company discovered the improperly recorded revenues, it reversed them, but recorded the reversal as an increase in the general and administrative expenses for the first

quarter of fiscal year 2024, rather than amending its fiscal year 2023 financial statements, thus misstating the financial statements for both periods. ¶¶62, 63. More, Lovesac improperly accounted for inventory and cost of goods sold during the Class Period, causing a material misstatement of its gross profit, operating income (loss), net income (loss), and diluted earnings per share. ¶¶67-69. The Company additionally improperly classified cash flows related to purchases of property and equipment and patents and trademarks not yet paid for at each period end, which caused it to materially misstate its reported cash flows. ¶¶73. The Complaint alleges that these material false statements were the result of Lovesac's admitted lack of effective internal controls over financial reporting during fiscal year 2023 and the first quarter of fiscal year 2024. ¶99.

After Lovesac disclosed that investors should no longer rely on management's report on internal control over financial reporting for the fiscal year ended January 29, 2023, and its previously issued financial statements reporting its results for fiscal year 2023 and the first quarter of fiscal year 2024, and admitted that it was likely to identify one or more material weaknesses in its internal controls over financial reporting in its planned restatement of these results, its stock price fell $0.70 per share, or 2.95%, to close at $23.06 per share on August 17, 2023. ¶¶127-128.

B. Procedural History

On December 19, 2023, Albert Gutknecht filed the initial complaint, asserting securities fraud claims under Sections 10(b) and 20(a) of the Securities Exchange Act of 1934 ("Exchange Act"), 15 USC §§ 78j(b) and 78t(a), and Securities and Exchange Commission ("SEC") Rule 10b-5 promulgated thereunder (17 C.F.R. § 240.10b-5). (ECF No. 1). On March 11, 2024, the Court appointed Plaintiff as Lead Plaintiff, and approved Plaintiff's selection of The Rosen Law Firm, P.A., as lead counsel and Faxon Law Group, LLC as liaison counsel. (ECF No. 27). On May 10, 2024, Plaintiff filed the Amended Complaint. (ECF No. 38).

C. The Settlement

After Plaintiff filed the Amended Complaint, the parties engaged in arm's-length discussions concerning class-wide resolution of the action. Declaration of Leah Heifetz-Li In Support of (1) Final Approval of Proposed Class Action Settlement and (2) Award of Attorneys' Fees, Reimbursement of Expenses, and Award to Plaintiff ("Heifetz-Li Decl.") ¶20. After Defendants responded to Plaintiff's initial demand, the parties engaged in negotiations for approximately one week, reaching an agreement in principle on May 20, 2024. *Id.* ¶21. On May 29, 2024, the Parties executed a term sheet, broadly setting forth the terms of the Settlement. *Id.* On June 18, 2024, the parties notified the Court of their agreement in principle. (ECF No. 43.) The Court subsequently granted the parties' request to stay all proceedings in the Action, pending its consideration of Plaintiff's anticipated motion for preliminary approval of the Settlement. (ECF No 44).

On July 31, 2024, Plaintiff filed her motion for preliminary approval, which included the Stipulation and proposed notices to the Settlement Class Members notice. (ECF No. 45.) On August 1, 2024, the Court entered the Preliminary Approval Order, calling for notice, and setting a Fairness Hearing for December 9, 2024. (ECF No. 46.)

1. Cash Consideration and Release

The Settlement provides for a payment of $615,000 in cash to pay the Settlement Class's claims. If the Court grants final approval of the Settlement, Plaintiff, on behalf of the Settlement Class Members, will forever release her claims against the Defendants and their related parties that were alleged or could have been alleged in this Action. Defendants will release any claims that could have been brought against Plaintiff related to the prosecution of this Action.

2. Notice to the Class

Pursuant to the Preliminary Approval Order, the Court-appointed Claims Administrator, Strategic Claims Services ("SCS"), provided potential Settlement Class Members, brokers, and nominee holders with notice of the Settlement. *See* Exhibit 1 (Declaration of Sarah Evans Concerning A) Mailing and Emailing of Notice; B) Publication of the Summary Notice; and C) Report on Requests for Exclusion and Objections ¶¶3-7 ("Evans Decl")) to Heifetz-Li Decl. The notice advised potential class members of the terms of the Settlement and Plan of Allocation; that Plaintiff's Counsel would seek a fee award not to exceed one-third of the Settlement Amount, or $205,000, plus interest; recovery of actual litigation expenses not to exceed $45,000; an award to Plaintiff of $3,500; and that any objections to any aspect of the Settlement or to the fee and expense request were due to be received by the Court and counsel no later than November 4, 2024. Evans Decl. Exs. A-D.

As of the date of this writing, the Court appointed Claims Administrator has notified 28,440 potential Settlement Class Members either by mailed or emailed Postcard Notice. Evans Decl. ¶¶6-8. The Claims Administrator also established and continues to maintain a website dedicated to the Settlement, https://www.strategicclaims.net/lovesac/. *Id*. ¶11. The website also provides a link for online claim filing and lists important deadlines. *Id*. Additionally, the Claims Administrator disseminated the Summary Notice over *PR GlobeNewswire*. *Id*. ¶9.

3. Exclusion and Objection Deadline

Requests for exclusion must be received on or before November 4, 2024. As of the date of this writing, there have been no requests for exclusion. Evans Decl. ¶12. Objections to the Settlement must be received by the Court and counsel by November 4, 2024. As of this writing there have been no objections to any aspect of the Settlement. *Id*. ¶13.

4. The Plan of Allocation

The Notice sent to potential Settlement Class Members describes the Plan of Allocation. Evans Decl., Ex. A at 10-14. Plaintiff's Counsel formulated the Plan of Allocation with the help of the Claims Administrator to fairly and reasonably distribute the Net Settlement Amount to Settlement Class Members consistent with the federal securities laws and the principles of loss causation. To that end, the Plan of Allocation does not compensate losses resulting from "in and out" transactions, *i.e.* losses from sales made prior to revelation of the truth. *See Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 342 (2005) ("But if, say, the purchaser sells the shares before the relevant truth begins to leak out, the misrepresentation will not have led to any loss."). The Plan of Allocation establishes a formula that determines authorized claimants' recognized losses based on the foregoing application of the securities laws and calculates Settlement Class Members' *pro rata* share of the Settlement Fund (*i.e.*, Settlement Amount less attorneys' fees and expenses, and award to Plaintiffs). Evans Decl., Ex. A at 10-14.

III. ARGUMENT

A. The Court Should Grant Final Certification of the Settlement Class

Federal Rule of Civil Procedure 23(a) provides that a movant must meet four requirements to be entitled to class certification: numerosity, commonality, typicality, and adequacy of representation. In addition, Federal Rule of Civil Procedure 23(b)(3) provides that the movant must show both (i) that common questions predominate over any questions affecting only individual members, and (ii) that class resolution is superior to other available methods for the fair and efficient adjudication of the controversy.

In the Preliminary Approval Order, the Court found, "preliminarily and for purposes of this Settlement only, the prerequisites for a class action under Rules 23(a) and (b)(3) of the Federal Rules of Civil Procedure have been satisfied[.]" ECF No. 46, at 3 (finding each of the six factors

of Rule 23(a) and (b)(3) had been satisfied). Nothing has changed since the Court entered the Preliminary Approval Order. Thus, Plaintiff respectfully requests that the Court grant final certification to this Settlement Class.

B. The Court Should Approve the Notice to the Settlement Class as Satisfying the Requirements of Rule 23 and Due Process

The notice program, alerting the Settlement Class to their rights to file a claim or request exclusion, the right to object, and the consequences of any particular choice, complies with this Court's Preliminary Approval Order and satisfies Fed. R. Civ. P. 23(c)(2) and Rule 23(e)(1), the Private Securities Reform Act of 1995 ("PSRLA"), 15 U.S.C. §78u-4(a)(7), and due process.

Courts evaluate compliance with Rule 23 and due process, measuring the notice program's reasonableness. Fed. R. Civ. P. 23(e)(1); *Arbuthnot v. Pierson*, 607 F. App'x 73 (2d Cir. 2015). Notice is reasonable where it "fairly apprise[s] 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." *Id.* at 73–74. Notice need not be perfect but only "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); Fed. R. Civ. P. 23(e)(2)(C)(ii). In its Preliminary Approval Order, the Court approved the notice program and its substance (ECF No. 46, ¶¶10-17) and appointed SCS as Claims Administrator (*id.*, ¶9). Under Lead Counsel's direction, SCS executed the notice program precisely and timely as the Court ordered. SCS sent the Depository Trust Company the Long Notice and Proof of Claim for the DTC to publish on its Legal Notice System on August 26, 2024. Evans Decl., ¶3. SCS also notified 1,039 banks and brokerage companies as well as 1,266 mutual funds, insurance companies, pension funds, and money managers (together, "Nominees") of the Settlement and requested that, within 7 calendar days from the date of the letter, they either (i) provide SCS with a list of the names, last-known

addresses, and email addresses (if available) of such beneficial purchasers/owners so that SCS could promptly either mail or email them the Postcard Notice; (ii) request from SCS copies of the Postcard Notice sufficient to send to their clients who were beneficial purchasers/owners and, within 7 calendar days of receipt of the Postcard Notices, send them to their clients who may be beneficial purchasers/owners; or (iii) request from SCS the electronic Postcard Notice and, within 7 calendar days of receipt, email the Postcard Notice to their clients who were beneficial purchasers/owners. *Id.*, ¶4. To provide actual notice to those persons and entities that purchased Lovesac common stock during the Settlement Class Period, SCS mailed or emailed the Postcard Notice to 28,440 potential members of the Settlement Class. *Id*., ¶¶5-8. Additionally, Summary Notice was published electronically once on *GlobeNewswire* on September 13, 2024. *Id.*, ¶9. SCS has also maintained a toll-free telephone number for Settlement Class Members to call and obtain information about the Settlement, as well as a webpage on its website[2] with information about the Settlement. *Id.* ¶¶10-11. Plaintiff respectfully requests, therefore, that the Court approve the notice program as the best practicable notice, complying with Rule 23, the PSLRA, and due process.

C. The Court Should Approve the Settlement Because the Settlement Is Fair, Adequate and Reasonable and Satisfies Rule 23(e)(2)

Public policy favors settlement, particularly in class actions. *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 116 (2d Cir. 2005) ("We are mindful of the 'strong judicial policy in favor of settlements, particularly in the class action context'"). When evaluating a proposed settlement under Fed. R. Civ. P. 23(e), courts determine whether a settlement, taken as a whole, is fair, reasonable, and adequate, ensuring that it was not the product of collusion. *Id.*; *see also Rodriguez v. CPI Aerostructures, Inc.*, 2023 WL 2184496, at *8 (E.D.N.Y. Feb, 16, 2023) (same).

[2] www.strategicclaims.net/lovesac.

1. The Product of Arm's-Length Negotiations, the Settlement Is Presumptively Fair and Not the Product of Collusion

A proposed class action settlement enjoys a presumption of fairness where, as here, it resulted from arm's-length negotiations, conducted by capable counsel who are experienced in class action litigation arising under the federal securities laws. *See Burns v. FalconStor Software, Inc.*, No. 10 CV 4572 (ERK), 2014 WL 12917621, at *4 (E.D.N.Y. Apr. 11, 2014) (citing *Wal-Mart*, 396 F.3d at 116). Indeed, "absent evidence of fraud or overreaching, [courts] consistently have refused to act as Monday morning quarterbacks in evaluating the judgment of counsel." *Trief v. Dun & Bradstreet Corp.*, 840 F. Supp. 277, 281 (S.D.N.Y. 1993). Accordingly, this Court may presume that the Settlement is fair, adequate, and reasonable as the product of "arms-length negotiations between experienced, capable counsel." *In re Citigroup Inc. Bond Litig.*, 296 F.R.D. 147, 155 (S.D.N.Y. 2013) (quoting *Wal-Mart*, 396 F.3d at 116). Plaintiff respectfully requests that the Court finally approve this Settlement.

2. Application of the *Grinnell* Factors Supports the Presumption of Fairness

With the presumption of fairness, this Court will evaluate the Settlement, "examin[ing] the fairness, adequacy, and reasonableness of a class settlement according to the *Grinnell* factors," including:

> (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.

City of Detroit v. Grinnell Corp., 495 F.2d 448, 463 (2d Cir. 1974). In weighing these factors, courts recognize that settlements require give and take between the negotiating parties. Thus,

courts do not attempt to rewrite settlement agreements or try to resolve issues that are left undecided as a result of the parties' compromise. *See, e.g., In re Warner Commc'ns Sec. Litig.*, 798 F.2d 35, 37 (2d Cir. 1986) ("It is not a district judge's job to dictate the terms of a class settlement.").

While courts consider each *Grinnell* factor, "not every factor must weigh in favor of settlement[. R]ather court[s] should consider the totality of these factors in light of the particular circumstances." *In re IMAX Sec. Litig.*, 283 F.R.D. 178, 189 (S.D.N.Y. 2012). "[W]hen evaluating a settlement agreement, the court is not to substitute its judgment for that of the parties, nor is it to turn consideration of the adequacy of the settlement into a trial or a rehearsal of the trial." *In re Sony Corp. SXRD*, 448 F. App'x 85, 87 (2d Cir. 2011). Plaintiffs submit that the proposed settlement is fair, reasonable and adequate when measured under the foregoing criteria and should be approved by this Court.

a. The Case Is Complex, and Continued Litigation Would Be Protracted and Costly

In general, "the more complex, expensive, and time consuming the future litigation, the more beneficial settlement becomes as a matter of efficiency to the parties and to the Court." *In re Citigroup Inc. Sec. Litig.*, 965 F. Supp. 2d 369, 381–82 (S.D.N.Y. 2013). This is particularly true here, as "securities class actions are by their very nature complicated and district courts in this Circuit have 'long recognized' that securities class actions are 'notably difficult and notoriously uncertain' to litigate." *City of Providence v. Aeropostale, Inc.*, 2014 WL 1883494, at *5 (S.D.N.Y. May 9, 2014) (quoting *In re Bear Stearns Companies, Inc. Sec., Derivative, & ERISA Litig.*, 909 F. Supp. 2d 259, 266 (S.D.N.Y. 2012)), *aff'd sub nom. Arbuthnot v. Pierson*, 607 F. App'x 73 (2d Cir. 2015). This Action is no exception. While Plaintiff believes that her claims are meritorious, there is always uncertainty in litigation, and the Settlement avoids further, expensive litigation that

would not necessarily lead to a greater recovery for the Settlement Class Members. *See Slomovics v. All for a Dollar, Inc.*, 906 F. Supp. 146, 149 (E.D.N.Y. 1995) ("The potential for this litigation to result in great expense and to continue for a long time suggest that settlement is in the best interests of the Class.").

Litigating motions to dismiss, for class certification, summary judgment, and trial in this case would be expensive and risky. Not only would the class risk recovering nothing at all or less than the Settlement, but because the loser at trial would almost certainly appeal, the Class would likely not collect any judgment for many years. *See In re Luxottica Grp. S.p.A. Sec. Litig.*, 233 F.R.D. 306, 311 (E.D.N.Y. 2006) ("A trial would probably not have resulted in the conclusion of the action. Time-consuming post-trial motions and appeals were almost inevitable. The action could have gone on for many more years. Either no recovery for the class or substantial loss to defendants could have ultimately resulted."). Further litigation would have required substantial additional expenditures of time and resources, with a material risk of a lower recovery, if any. *See In re AOL Time Warner, Inc.*, 2006 WL 903236, at *9 (S.D.N.Y. Apr. 6, 2006) ("In addition to the complex issues of fact involved in this case, the legal requirements for recovery under the securities laws present considerable challenges, particularly with respect to loss causation and the calculation of damages"). Indeed, establishing damages would be particularly risky because Defendants would contest the statistical significance of the decline in Lovesac's stock price in light of its normal trading volatility. Heifetz-Li Decl. at ¶34.

b. Adequate Notice and Reaction of the Class

A "[l]ack of objection is strong evidence of the settlement's fairness." *Luxottica*, 233 F.R.D. at 311; *Grinnell,* 495 F.2d at 462 (approving settlement where 20 objectors appeared from group of 14,156 claimants); *Olden v. LaFarge Corp.*, 472 F. Supp. 2d 922 (E.D. Mich. 2007) (approving settlement where 82 objectors appeared from a class of 11,000 people). To date, no Settlement

Class Members have requested exclusion from the Settlement, and no one has objected to the Settlement. Evans Decl. ¶¶12-13. Plaintiff will address any further requests for exclusion or objections in her Reply.

c. The Stage of Proceedings and Discovery Completed

The Parties agreed to the Settlement only after Plaintiff (1) investigated the claims in this Action to plead a detailed amended complaint, which required both scouring public information and hiring private investigators; and (2) negotiated the Settlement. Heifetz-Li Decl. ¶¶20-21. Then, after the Court entered the Preliminary Approval Order, Plaintiff took due-diligence discovery. *Id.* at ¶26. Accordingly, Plaintiff had the information she needed to evaluate the Settlement, and she understood the strengths and weaknesses of this case. *See Luxottica*, 233 F.R.D. at 312 (settlement approved where counsel had "a clear view of the strengths and weaknesses of the case") (citing *In re Warner Commc'ns Sec. Litig.*, 618 F. Supp. 735, 745 (S.D.N.Y. 1985), *aff'd,* 798 F.2d 35 (2d Cir. 1986). The stage of proceedings thus weighs in favor of approving the Settlement.

d. Plaintiff Faced Risks to Establishing Liability and Damages

In assessing class settlements courts recognize that the immediacy and certainty of a recovery provide benefits to the settlement class. *See Luxottica*, 233 F.R.D. at 316 ("The immediacy and certainty of a recovery is a factor for the court to balance in determining whether the proposed settlement is fair, reasonable, and adequate"). Chasing a better result through continued litigation creates a risk that Settlement Class Members would end up with less money or no money at all. Accordingly, "the Court should balance the benefits afforded to members of the Class and the immediacy and certainty of a substantial recovery for them against the continuing risks of litigation." *Maley v. Del Glob. Techs. Corp.*, 186 F. Supp. 2d 358, 364 (S.D.N.Y. 2002).

One risk is that the Court might grant Defendants' anticipated motion to dismiss. There is a material risk that the Court could agree that Defendants did not materially mislead investors with

fraudulent intent or cause their losses. One of the elements Plaintiff must prove, scienter, is notoriously difficult to establish. *See In re Telik, Inc. Sec. Litig.*, 576 F. Supp. 2d 570, 579 (S.D.N.Y. 2008). If the Court granted a motion to dismiss, then Plaintiff would have no recovery. This same risk would exist on a motion for summary judgment even if this action survived a motion to dismiss. The court could grant a motion by defendants, and by then, Plaintiff would have spent years, even more attorney hours, tens of thousands of dollars in additional costs, and many judicial resources, and recovered nothing.

Likewise, the jury might find against Plaintiff at trial, and Plaintiff and the Settlement Class would recover nothing after expending significantly more time, expense, judicial resources, and the jury's time. Proof of damages in a securities case is also always difficult, and invariably requires highly technical expert testimony. The experts retained by Plaintiffs and Defendants no doubt would have widely divergent views as to the range of recoverable damages at trial. In this case, Plaintiff would face particular risk in establishing whether the decline in Lovesac's stock price was statistically significant in light of the stock's normal trading volatility. Heifetz-Li Decl. ¶32. Because, before verdict, neither the parties nor a court can predict which expert's testimony or methodology the jury would adopt, courts recognize the need for compromise. *See generally In re Am. Bank Note Holographics, Inc.*, 127 F. Supp. 2d 418, 426–27 (S.D.N.Y. 2001) (stating that "[i]n such a battle, Lead Counsel recognize the possibility that a jury could be swayed by experts for Defendants, who could minimize or eliminate the amount of Plaintiffs' losses"); see also *In re PaineWebber Ltd. P'ships Litig.*, 171 F.R.D. 104, 129 (S.D.N.Y. 1997), *aff'd*, 117 F.3d 721 (2d Cir. 1997).

Finally, a favorable jury verdict might be reversed on appeal. In that case, in addition to all the costs of taking a case through trial, Plaintiff would have also spent the Second Circuit's time and again recovered nothing.

Accordingly, the material risk that Plaintiff and the Settlement Class would recover less than the Settlement Amount or even nothing at all favors final approval.

e. The Risks of Maintaining the Class Action Through Trial

Another risk is that the Court might deny class certification. In moving for class certification, the parties would have to engage in expert discovery to show that Lovesac's common stock traded on an efficient market, entitling investors to a presumption of reliance on Defendants' alleged false statements and omissions. Such a showing would be based on expert testimony, subjecting the Class to all the risks inherent to any such battle of the experts. *See In re MetLife Demutualization Litig.*, 689 F. Supp. 2d 297, 338–39 (E.D.N.Y. 2010). Defendants could then attempt to rebut that presumption by showing a lack of price impact. *See Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 281 (2014). In this case, Plaintiff faces risk in establishing whether the decline in Lovesac's stock price was statistically significant in light of the stock's normal trading volatility, a key element that Defendants would have challenged. Heifetz-Li Decl. at ¶31. The risks of maintaining a class action through trial thus weigh in favor of approving the Settlement.

f. The Settlement Amount Is in the Range of Reasonableness in Light of the Best Possible Recovery and Attendant Risks

Courts typically analyze the last two *Grinnell* factors together. *See Grinnell*, 495 F.2d at 463. In so doing, courts "consider[] and weigh[] 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." *In re Flag Telecom Holdings, Ltd. Sec. Litig.*, 2010 WL 4537550, at *20

(S.D.N.Y. Nov. 8, 2010) (quoting *Grinnell*, 495 F.2d at 462). A court's "determination of whether a given settlement amount is reasonable in light of the best possibl[e] recovery does not involve the use of a mathematical equation yielding a particularized sum." *Bear Stearns*, 909 F. Supp. 2d at 269. Instead, the Second Circuit has held "[t]here is a range of reasonableness with respect to a settlement—a range which recognizes the uncertainties of law and fact in any particular case and the concomitant risks and costs necessarily inherent in taking any litigation to completion." *Wal-Mart*, 396 F.3d at 119.

Here, under the best-case scenario—assuming Plaintiffs overcome all the obstacles noted above and win at trial, and Defendants do not prevail on any of their arguments—Plaintiffs' expert's estimate of the maximum, potentially recoverable class-wide damages is $1.38 million. Heifetz-Li Decl. ¶24. In a factually and legally complex securities class action lawsuit, responsible counsel cannot be certain that they will be able to obtain – and enforce – a judgment at or near the full amount of the class-wide damages that they would propose. Thus, the possibility that a class "might have received more if the case had been fully litigated is no reason not to approve the settlement." *Granada Invs., Inc. v. DWG Corp.*, 962 F.2d 1203, 1206 (6th Cir. 1992). More, Defendants have no economic incentive to enter into settlements unless they receive a discount on the value of the claims.

Indeed, the Second Circuit has held that "[t]he fact that a proposed settlement may only amount to a fraction of the potential recovery does not, in and of itself, mean that the proposed settlement is grossly inadequate and should be disapproved." *Grinnell*, 495 F.2d at 455; *accord In re AT & T Corp.*, 455 F.3d 160, 170 (3d Cir. 2006). "In fact there is no reason, at least in theory, why a satisfactory settlement could not amount to a hundredth or even a thousandth part of a single percent of the potential recovery." *Grinnell*, 495 F.2d at 455, n.2. Courts agree that the

determination of a "reasonable" settlement is not susceptible to a single mathematical equation yielding a particularized sum. *MetLife*, 689 F. Supp. 2d at 340 (citing *PaineWebber*, 171 F.R.D. at 130).

In this case, of course, the Settlement recovers a substantial portion – 44.6% – of maximum estimated damages. Heifetz-Li Decl. at ¶24. This percentage of recovery of damages is well above the range of typical class action securities settlements. *See, e.g., In re China Sunergy Sec. Litig.*, 2011 WL 1899715, at *15 (S.D.N.Y. May 13, 2011) (noting that the average settlement in securities class actions ranges from 3% to 7% of the class' total estimated losses); *Velez v. Novartis Pharms. Corp.*, 2010 WL 4877852, at *14 (S.D.N.Y. Nov. 30, 2010) (noting that "courts often approve class settlements even where the benefits represent 'only a fraction of the potential recovery'" and collecting cases from the Southern District where settlements were approved for percentages of estimated damages such as 1.6%, 2%, and 5%). Moreover, the percentage recovery also exceeds the 1.8% median settlement value in 2023 for all securities class actions. *See* NERA Economic Consulting, *Recent Trends in Securities Class Action Litigation: 2023 Full-Year Review* (January 23, 2024).[3] Thus, the Settlement proposes a reasonable recovery to Settlement Class Members.

For the foregoing reasons, the proposed Settlement is both procedurally and substantively fair, reasonable, and adequate, and in the Settlement Class's best interests. Analysis of the *Grinnell* factors should cause this Court, therefore, to order final approval.

[3] Heifetz-Li Decl. Ex. 6.

3. The Settlement Satisfies the Remaining Rule 23(e) Factors

a. Attorneys' Fees

Rule 23(e)(2)(C)(iii) addresses "the terms of any proposed award of attorney's fees, including timing of payment." As discussed in the Memorandum of Law in support of the motion for an award of attorneys' fees, expenses, and awards to Plaintiff, filed concurrently herewith, Lead Counsel seek an award of attorneys' fees of one-third of the Settlement and reimbursement for litigation expenses. The notice program this Court approved and that Lead Counsel, through the Claims Administrator, executed fully discloses these fees and costs. *See* Evans Decl., Ex. A, at 14.

In addition, Lead Counsel requests that any award of fees and expenses be paid at the time the Court makes its award. *See In re Genworth Fin. Sec. Litig.*, 210 F. Supp. 3d 837, 846 (E.D. Va. 2016) (ordering that "attorneys' fees and Litigation Expenses awarded above may be paid to Lead Counsel immediately upon entry of this Order"). Indeed, such "provisions are common." *Pelzer v. Vassalle*, 655 F. App'x 352, 365 (6th Cir. 2016).

The fees and costs Plaintiff seeks are in line with other fee and costs awards in this Circuit. The Long Notice, the Postcard Notice, and the Summary Notice informed the Settlement Class that Plaintiff would seek attorney's fees and expenses, and no Settlement Class Member has objected. As such, the Settlement satisfies Rule 23(e)(2)(C)(iii).

Plaintiff also requests an award of $3,500 in connection with her efforts in stewarding the Action pursuant to 15 U.S.C. § 78u-4(a)(4). Courts in this Circuit "routinely award such costs and expenses both to reimburse the named plaintiffs for expenses incurred through their involvement with the action and lost wages, as well as to provide an incentive for such plaintiffs to remain involved in the litigation and to incur such expenses in the first place." *In re Gilat Satellite Networks, Ltd.*, 2007 WL 2743675, at *19 (E.D.N.Y. Sept. 18, 2007).

Plaintiff, through Lead Counsel, has detailed in the notice program the attorneys' fees and expenses and awards she seeks. No member of the Settlement Class has objected. As such, the requests for compensation support approval of the Settlement.

b. With the Exception of a Supplemental Agreement About a Termination Threshold, the Parties Have No Other Agreement

Pursuant to Rule 23(e)(2)(C)(iv), as disclosed in the Stipulation (ECF No. 45-3, ¶¶67, D(1)), and in Plaintiffs' Preliminary Approval brief (ECF No. 45-1, at 19), the Parties have entered into a standard supplemental agreement, providing that Defendants have the option to terminate the Settlement if the number of shares that Settlement Class Members who exclude themselves from the Settlement purchased equals or exceeds a certain amount. As is standard practice in securities class actions, while the Stipulation identifies the supplemental agreement, the terms of that agreement are confidential to avoid creating incentives for a small group of investors to opt out solely to leverage the threshold to exact an individual settlement. This agreement has no bearing on the fairness of the Settlement, and thus this factor should not impact final approval. *See Christine Asia Co. v. Yun Ma*, 2019 WL 5257534, at *15 (S.D.N.Y. Oct. 16, 2019) (opt-out agreements are "standard in securities class action settlements and ha[ve] no negative impact on the fairness of the Settlement").

D. The Court Should Grant Final Approval of the Plan of Allocation

Plaintiff requests that the Court approve the proposed Plan of Allocation of Settlement proceeds. The Plan of Allocation "must be fair and adequate." *In re WorldCom, Inc. Sec. Litig.*, 388 F. Supp. 2d 319, 344 (S.D.N.Y. 2005) (internal quotation omitted). "When formulated by competent and experienced counsel, a plan for allocation of net settlement proceeds need have only a reasonable, rational basis." *IMAX*, 283 F.R.D. at 192; *see also Christine Asia,* 2019 WL 5257534, at 15-16. A fair and rational plan may take into account "the relative strength and values

of different categories of claims." *In re Glob. Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 462 (S.D.N.Y. 2004); *see also In re Marsh & McLennan Companies, Inc. Sec. Litig.*, 2009 WL 5178546, at *13 (S.D.N.Y. Dec. 23, 2009) ("In determining whether a plan of allocation is fair, courts look largely to the opinion of counsel").

The Long Notice sets forth the proposed Plan of Allocation. Evans Decl., Ex. A at 10-14. Lead Counsel developed the Plan with the Claims Administrator with the principles of loss causation in mind. Therefore, those shareholders who bought and then sold shares "before the relevant truth begins to leak out" have no recognized losses under the Plan of Allocation because "the misrepresentation will not have led to any loss." *Dura*, 544 U.S. at 342; *see also In re Oracle Sec. Litig.*, 1994 WL 502054, at *1 (N.D. Cal. June 18, 1994) ("A plan of allocation that reimburses class members based on the extent of their injuries is generally reasonable").

In addition to excluding those who incurred no provable damages, the Plan of Allocation also recognizes differences in damages incurred by those who bought and sold their shares at different times during the Class Period, reflecting the different damages due to the purchase and sale prices that they paid. Evans Decl., Ex. A at 11. After considering lack of loss causation and the timing of Settlement Class Members stock purchases and sales, the Plan of Allocation does not discriminate between Settlement Class Members in the same position. The Net Settlement Fund will be distributed on a *pro rata* basis depending on a Settlement Class Member's recognized losses. No Settlement Class Member has objected to the Plan of Allocation.

The Plan of Allocation has a rational basis and Lead Counsel believes it fairly compensates Class Members. This Court should approve the Plan of Allocation.

IV. CONCLUSION

For the foregoing reasons, the Court should (i) certify the Settlement Class, (ii) approve the Settlement, and (iii) approve the Plan of Allocation.

Dated: October 28, 2024

Respectfully submitted,

FAXON LAW GROUP, LLC

/s/ *Joel T. Faxon* (CT 16255)
Joel T. Faxon, Esq.
Brittany S. Cates, Esq. (CT 27106)
59 Elm Street #3
New Haven, CT 06510
Telephone: 203.624.9500
Email: jfaxon@faxonlawgroup.com
bcates@faxonlawgroup.com

Liaison Counsel for Lead Plaintiff and the Class

THE ROSEN LAW FIRM, P.A.

Jacob A. Goldberg
(*pro hac vice*)
Leah Heifetz-Li
(*pro hac vice*)
101 Greenwood Avenue
Suite 440
Jenkintown, PA 19046
Tel: (215) 600-2817
Fax: (212) 202-3827
Email: jgoldberg@rosenlegal.com
lheifetz@rosenlegal.com

Lead Counsel for Lead Plaintiff and the Class

SCHALL LAW FIRM
Brian Schall, Esq.
2049 Century Park E #2460
Los Angeles, CA 90067
Telephone: (310) 301-3335
Email: brian@schallfirm.com

Additional Counsel