UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

BEEZLEY v. FENIX PARTS, INC., *et al.*	Case No. 1:17-cv-07896 Honorable Charles R. Norgle

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

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Pursuant to Rule 23 of the Federal Rules of Federal Procedure, Lead Plaintiffs Thomas Weeks, Douglas Barnard, and Keith B. White ("Plaintiffs") on behalf of themselves and the Settlement Class, respectfully submit this memorandum of law in support of their motion requesting (i) final approval of the proposed settlement of the above-captioned class action (the "Action") and (ii) approval of the proposed Plan of Allocation.[1]

PRELIMINARY STATEMENT

After nearly three years of litigation, Plaintiffs, through their counsel, obtained a $3,300,000 all cash, non-reversionary Settlement for the benefit of the Settlement Class. As described below and in the Joint Declaration, this recovery is an excellent result for the Settlement Class, providing a significant and certain recovery that avoids the substantial risks and expenses of continued litigation, including the risk of recovering less than the Settlement Amount, or nothing at all.

Plaintiffs' and Lead Counsel's substantial efforts and understanding of the strengths and weaknesses of the Action also support final approval. Among other things, Lead Counsel:

- reviewed and analyzed SEC filings, press releases, publicly-available documents, reports, announcements, news articles, investor conference call transcripts, analyst reports, and other public information regarding the Fenix and the other Defendants;
- worked with a damages and loss causation expert to analyze the Company's stock-price movement;
- retained and worked with a private investigator who conducted numerous interviews of former Company employees and other third parties;
- drafted the comprehensive, factually-detailed, 129-page Complaint incorporating the forgoing factual research and investigation;
- researched, drafted, and filed an omnibus opposition t Defendants' motions to dismiss;

[1] All capitalized terms not otherwise defined herein have the same meaning as those in the Stipulation of Settlement dated November 6, 2019 (ECF No. 131-1) (the "Stipulation") or the concurrently filed Declaration of Ex Kano S. Sams II and Adam M. Apton in Support of: (I) Lead Plaintiffs' Motion for Final Approval of Class Action Settlement and Plan of Allocation; and (II) Lead Counsel's Motion for an Award of Attorneys' Fees and Reimbursement of Litigation Expenses (the "Joint Declaration" or "Joint Decl."). All citations to "¶ __" and "Ex. __" in this memorandum refer, respectively, to paragraphs in, and Exhibits to, the Joint Declaration.

- prepared for, attended, and participated in the status conference held by the Court on July 27, 2018;
- researched, briefed, and successfully opposed Defendants' motion for reconsideration;
- researched, briefed, and successfully opposed Defendants' motion for protective order;
- prepared and served numerous discovery requests and third-party subpoenas;
- reviewed and analyzed tens of thousands of pages of documents produced by Defendants and third parties;
- researched and fully briefed the motion for class certification, which included submission of an expert report on market efficiency;
- drafted a detailed mediation statement that set forth the facts of the case and analyzed the strengths and weaknesses of the Action and potential damages;
- drafted a comprehensive response to Defendants' mediation statement;
- engaged in a full-day mediation session overseen by Michelle Yoshida, Esq., of Phillips ADR Enterprises, an experienced and well-respected mediator;
- continued settlement negotiations after the mediation session;
- drafted and then negotiated the Stipulation and related exhibits; and
- drafted the preliminary approval and final approval briefs. ¶¶11(a)-(r), 15-63.

Thus, Plaintiffs and their counsel had a comprehensive understanding of the strengths and weaknesses of the case and had sufficient information to make an informed decision regarding the fairness of the Settlement.

Plaintiffs and Lead Counsel believe that the Settlement is an excellent result for the Settlement Class. This belief is supported by, among other things: the certainty of a $3,300,000 recovery today versus the significant risk of a smaller or even no recovery following years of additional litigation; an analysis of the facts adduced to date; past experience litigating complex securities class actions; the serious disputes between the Parties concerning the merits; and the favorable reaction of the Settlement Class. ¶¶12, 29-45, 64-83.

Plaintiffs also move for approval of the Plan of Allocation of the Net Settlement Fund. The Plan of Allocation was developed in conjunction with one of Plaintiffs' damages expert and is designed to equitably distribute the proceeds of the Net Settlement Fund to Settlement Class

Members. ¶¶92-100. As such, Plaintiffs respectfully submit that it too should be approved. For these reasons, and those set forth below and in the Joint Declaration, Plaintiffs respectfully request that the Court grant final approval of the Settlement and Plan of Allocation and grant final certification of the Settlement Class for settlement purposes only.

ARGUMENT

I. STANDARDS GOVERNING APPROVAL OF CLASS ACTION SETTLEMENTS

Rule 23(e) of the Federal Rules of Civil Procedure requires judicial approval of the compromise of claims brought on a class-wide basis. The standard for determining whether to grant final approval to a class action settlement is whether the settlement is "fundamentally fair, adequate, and reasonable." Fed. R. Civ. P. 23(e)(2). "Federal courts naturally favor the settlement of class action litigation." *Isby v. Bayh*, 75 F.3d 1191, 1196 (7th Cir. 1996); *see also E.E.O.C. v. Hiram Walker & Sons, Inc.*, 768 F.2d 884, 888–89 (7th Cir. 1985) (recognizing that there is a "general policy favoring voluntary settlements of class action disputes").[2] This is because "[s]ettlement of the complex disputes often involved in class actions minimizes the litigation expenses of both parties and also reduces the strain such litigation imposes upon already scarce judicial resources." *In re: Sears, Roebuck & Co. Front-loading Washer Prod. Liab. Litig.*, 2016 WL 772785, at *6 (N.D. Ill. Feb. 29, 2016).

Courts in the Seventh Circuit consider the following factors in evaluating whether a class action settlement is fair, reasonable, and adequate under Rule 23:

> (1) the strength of the case for plaintiffs on the merits, balanced against the extent of settlement offer; (2) the complexity, length, and expense of further litigation; (3) the amount of opposition to the settlement; (4) the reaction of members of the class to the settlement; (5) the opinion of competent counsel; and (6) stage of the proceedings and the amount of discovery completed.

[2] Unless otherwise noted, all emphasis is added and all internal quotations and citations are omitted.

Wong v. Accretive Health, Inc., 773 F.3d 859, 863 (7th Cir. 2014); *Synfuel Techs., Inc. v. DHL Express (USA), Inc.*, 463 F.3d 646, 653 (7th Cir. 2006).

Additionally, pursuant to the recent amendments to Rule 23(e)(2), a court may approve a settlement as "fair, reasonable, and adequate" after considering the following four factors, most of which overlap with the factors considered by the Seventh Circuit:[3]

(A) whether the class representatives and class counsel have adequately represented the class;
(B) whether the proposal was negotiated at arm's length;
(C) whether 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 attorneys' fees, including timing of payment; and
(D) any agreement required to be identified under Rule 23(e)(3); and whether the proposal treats class members equitably relative to each other.

As demonstrated herein, the Settlement readily satisfies the factors set forth in Rule 23(e)(2) and by the Seventh Circuit and, accordingly, warrants final approval.

II. THE SETTLEMENT IS FAIR, REASONABLE, AND ADEQUATE

A. Application of the Seventh Circuit's Factors Supports Final Approval of the Settlement

1. The Strength of the Case on the Merits Balanced Against the Extent of the Settlement Offer

The strength of this case when balanced against the Settlement favors approval of the Settlement. The Seventh Circuit has "deemed the first factor to be the most important." *Accretive*, 773 F.3d at 864; *Synfuel*, 463 F.3d at 653. "The most important factor relevant to the fairness of a class action settlement is the strength of plaintiff's cases on the merits balanced against the amount

[3] *See Hale v. State Farm Mut. Automobile Ins. Co.*, 2018 WL 6606079, at *2 (S.D. Ill. Dec. 16, 2018) ("These considerations overlap with the factors previously articulated by the Seventh Circuit . . .").

offered in the settlement." *Accretive*, 773 F.3d at 864. In considering whether to enter into the Settlement, Plaintiffs, represented by experienced counsel, weighed the Settlement Amount against the strength of Plaintiffs' claims, taking into consideration the risks inherent in proving falsity, materiality, reliance, scienter, loss causation, and recoverable damages, as well as the expense and likely duration of the Action. *See, e.g.*, *Retsky Family Ltd. P'ship v. Price Waterhouse LLP*, 2001 WL 1568856, at *2 (N.D. Ill. Dec. 10, 2001) (finding the first factor weighed in favor of approval in securities class action, noting that it is not certain that plaintiff would have been able to prevail at trial); *Great Neck Capital Appreciation Inc. P'ship v. PricewaterhouseCoopers L.L.P.*, 212 F.R.D. 400, 409 (E.D. Wis. 2002) (approving a settlement and noting that the "factual and legal issues in the case are not simple, and a jury would have to evaluate conflicting evidence on such issues as scienter, materiality, causation and damages, as well as conflicting expert testimony").

Establishing Liability: Plaintiffs faced numerous hurdles to establishing liability. Here, Defendants would have continued to have vigorously challenged Plaintiffs' ability to establish scienter, the falsity and materiality of the alleged misleading statements, reliance, and loss causation, among other challenges. The principal risks are discussed in detail in the Joint Declaration at Section III. Briefly, regarding scienter, Defendants would likely argue that Plaintiffs could not prove that misrepresentations alleged were false and misleading. Specifically, Defendants would argue that the Individual Defendants had a good faith belief that their statements were true and that they had a reasonable basis for all calculations. ¶¶67-71.

While Plaintiffs were confident that they would be successful in demonstrating falsity and scienter, there is always a risk that the Court or a jury may have accepted Defendants' arguments, which would have eliminated the Exchange Act claims.

Loss Causation and Damages: Even if Plaintiffs were successful in proving liability,

Plaintiffs' ability to establish loss causation and damages also presented a significant risk to recovery. *See Goldsmith v. Tech. Sols. Co.*, 1995 WL 17009594, at *4 (N.D. Ill. Oct. 10, 1995) (approving settlement and noting that "even if plaintiffs were to prevail in establishing liability, providing causation and the existence and amount of damages would be problematic"). As set forth in the Joint Declaration, Defendants would argue that Fenix's disclosures did not reveal any truth or correct any misstatements and therefore the price declines in the Company's stock are not actionable. ¶72, 72-76. Plaintiffs' proposed damages calculation would have come under sustained attack by Defendants, and the correct measure of damages would likely have come down to an inherently unpredictable and hotly disputed "battle of the experts" where it would be impossible to predict with any certainty which arguments would find favor with a jury. *See In re Tyco Int'l, Ltd.*, 535 F. Supp. 2d 249, 260-61 (D.N.H. 2007) ("Proving loss causation would be complex and difficult. Moreover, even if the jury agreed to impose liability, the trial would likely involve a confusing 'battle of the experts' over damages.").

In contrast, the proposed Settlement provides a substantial and certain recovery of $3.3 million for the benefit of the Settlement Class, without the risk, delay and expense of continued litigation. Plaintiffs' consulting damages expert has estimated that if liability were established, ***maximum*** aggregate damages recoverable at trial, based on non-disaggregated stock price declines, would be approximately $22 million, meaning that the Settlement represents a recovery of approximately 15% of Plaintiffs' expert's estimate. ¶9, 82. Since the passage of the Private Securities Litigation Reform Act of 1995 ("PSLRA"), courts have approved settlements with far lower recoveries. *See, e.g., In re China Sunergy Sec. Litig.*, No. 07 Civ. 7895(DAB), 2011 WL 1899715, at *5 (S.D.N.Y. 2011) (the "average settlement amounts in securities fraud class actions where investors sustained losses over the past decade have ranged from 3% to 7% of the class

members' estimated losses."); *In re Merrill Lynch & Co., Inc. Research Reports Sec. Litig.*, No. 02 MDL 1484 (JFK), 2007 WL 313474, at *10 (S.D.N.Y. Feb. 1, 2007) (finding settlement representing recovery of approximately 6.25% of estimated damages to be "at the higher end of the range of reasonableness of recovery in class actions securities litigations"). Indeed, the median recovery in securities class actions in 2018 was approximately 2.6% of estimated damages. *See* Ex. 5 (Stefan Boettrich and Svetlana Starykh, Recent Trends in Securities Class Action Litigation: 2018 Full-Year Review (NERA Jan. 29, 2019) at p. 36, Fig. 28. Consequently, this factor favors approval of the Settlement. *See*, *e.g.*, *IBEW v. Int'l Game Tech., Inc.*, 2012 WL 5199742, at *3 (D. Nev. Oct. 19, 2012) (approving settlement where recovery was 3.5% of maximum damages and noting "this amount is within the median recovery in securities class actions settled in the last few years").

2. Complexity, Length, and Expense of Further Litigation

Courts also consider the likely "complexity, length, and expense of the litigation" in determining the propriety of the settlement. *Accretive*, 773 F.3d at 863; *Isby*, 75 F.3d at 1199. There can be no doubt that this securities action concerning misstatements about Fenix's inventory valuation, acquisition strategy, goodwill valuation, and lack of internal controls involves complex factual and legal issues. *See Retsky*, 2001 WL 1568856, at *2 ("Securities fraud litigation is long, complex and uncertain."). The asserted claims raise many complex issues, as evidenced by the 129-page Complaint, the extensive briefing on Defendants' motions to dismiss and motion for reconsideration, and the two opinions issued by the Court.

In the absence of a settlement now, the Parties would have continued the completion of extensive fact discovery, expert discovery on complicated issues pertaining to loss causation and damages, briefing on summary judgment, additional class certification briefing, pre-trial evidentiary motions, and trial—all with no guarantee of a better result. Indeed, even a meritorious case can be lost at trial. *See In re JDS Uniphase Corp. Sec. Litig.*, 2007 WL 4788556, at *1 (N.D. Cal. Nov. 27,

2007) (after a lengthy trial, jury returned a verdict against plaintiffs and the action was dismissed). Further, a successful jury verdict does not eliminate the risk to the class, and the additional delay of post-trial motions and the appellate process could last for years. *See Robbins v. Koger Props.*, 116 F.3d 1441, 1449 (11th Cir. 1997) (reversing $81 million jury verdict for securities fraud); *Hubbard v. BankAtlantic Bancorp, Inc.*, 688 F.3d 713 (11th Cir. 2012) (jury issued verdict on liability in favor of plaintiffs, but Eleventh Circuit affirmed judgment as a matter of law against plaintiffs for lack of proof of loss causation). Therefore, the expense, complexity, and likely duration of further litigation support approval of the Settlement.

3. Amount of Opposition to the Settlement and the Reaction of Members of the Class to the Settlement

The reaction of Class members also supports approval of the Settlement. This factor overlaps with Rules 23(e)(4), on the opportunity for exclusion, and 23(e)(5), on the opportunity to object. As required by Rule 23(e)(4) & (5), the Settlement affords Settlement Class Members the opportunity to request exclusion from, or object to, the Settlement. *See* Ex. 1-C ("Ewashko Decl.") (Notice at pp. 3, 15-17). Pursuant to this Court's Preliminary Approval Order, the Postcard Notice was mailed to potential Settlement Class Members who could be identified with reasonable effort. *See* Ex. 1 at ¶¶2-11. As of January 29, 2020, over 10,000 copies of the Postcard Notice have been disseminated to potential Settlement Class Members and nominees. *Id*. at ¶12. To date, no requests for exclusion have been received, and no objections have been filed with the Court.[4] Joint Decl. at ¶6, 100; Ewashko Decl. at ¶21. The Settlement Class's reaction to the Settlement—as exhibited the fact that there have been no requests for exclusion or objections—demonstrates strong support for the Settlement.

[4] As provided in the Preliminary Approval Order, Plaintiffs will file reply papers in support of the Settlement on February 28, 2020, after the deadline for requesting exclusions and objecting has passed. Plaintiffs' reply papers will address any requests for exclusion or objections.

4. The Opinion of Competent Counsel

"The Court can consider the opinion of competent counsel in determining whether a settlement is fair, reasonable, and adequate." *Retsky*, 2001 WL 1568856, at *3. Here, Lead Counsel firmly believe that the Settlement is fair, reasonable and adequate, especially in light of the risks, burdens, and expense of continued litigation. ¶10. Further, Glancy Prongay & Murray LLP, and Levi & Korsinsky, LLP are among the most experienced and skilled firms in the securities litigation field, and have a long and successful track record in such cases. *See* Exs. 6 & 7. Accordingly, this factor strongly favors approval of the Settlement.

5. Stage of the Proceedings and the Amount of Discovery Completed

The stage of the proceedings and amount of discovery completed further support approval of the Settlement. By the time the Parties agreed to settle, Plaintiffs and Lead Counsel had vigorously litigated the Action for several years and had a well-founded and realistic understanding of the strengths and weaknesses of the claims and defenses asserted. The Action has been hotly contested from its inception in January 2017 (*see* ¶¶11(a)-(r), 15-63 (detailing the investigation, briefing, discovery efforts, and other worked performed by Lead Counsel)) and, as such, Plaintiffs had a firm understanding of the likelihood of success and the potential recovery at trial at the time the Settlement was reached. Thus, this factor supports final approval of the Settlement. *See Accretive*, 773 F.3d at 864 (affirming approval of settlement where, unlike here, formal discovery had not commenced, but plaintiff had access to extensive public documents and a number of potential witness interviews).

B. The Rule 23(e) Factors Support Final Approval

The proposed Settlement also meets the criteria set forth in the amendments to Rule 23(e)(2), some of which are covered by the traditional Seventh Circuit factors discussed above.

1. Plaintiffs and Lead Counsel Have Adequately Represented the Settlement Class (Rule 23(e)(2)(A))

Plaintiffs and Lead Counsel have adequately represented the Settlement Class. Plaintiffs, like all other Settlement Class Members, purchased Fenix common stock during the Class Period and suffered damages. *See* ECF No. 130. Thus, the claims of Plaintiffs and the Settlement Class would prevail or fail in unison. Moreover, the common objective of maximizing recovery from Defendants aligns with the interests of Plaintiffs and all other Settlement Class Members. Plaintiffs participated in the litigation, conferred with counsel, and agreed to settle the case with an informed understanding of the strengths and weaknesses of the claims. *See* Ex. 2 at ¶¶3-6; Ex. 3 at ¶¶3-6; Ex. 4 at ¶¶3-6. Additionally, throughout the Action, Plaintiffs had the benefit of the advice of knowledgeable counsel well-versed in class action securities cases. *See supra* at § II.A.4. Consequently, this factor favors approval.

2. The Settlement Is the Result of Arm's-Length Negotiations (Rule 23(e)(2)(B))

The Settlement was only achieved after thorough, arm's-length negotiations between well-informed and experienced counsel, under the supervision of an experienced mediator, and rigorous investigation into the claims. A formal mediation session was held on May 21, 2019 and was overseen by a well-respected and experienced mediator, Ms. Yoshida. *See Todd v. STAAR Surgical Co.*, 2017 WL 4877417, at *2 (C.D. Cal. Oct. 24, 2017) ("The Proposed Settlement is the outcome of an arms-length negotiation conducted with the help of experienced mediator Michelle Yoshida of Phillips ADR."). The mediation was preceded by the exchange of two sets of mediation statements. Although the Parties were unable to reach a resolution during the mediation, on May 30, 2019, the Parties accepted the mediator's proposal to settle the matter for $3,300,000 in cash. During the following months, the Parties worked diligently to finalize the Settlement. Given the arm's-length nature of the negotiations and the active involvement of an experienced mediator, there can be no

question that the Settlement was fairly and honestly negotiated. *See Mangone v. First USA Bank*, 206 F.R.D. 222, 226 (S.D. Ill. 2001) ("a settlement proposal arrived at after arms-length negotiations by fully informed, experienced and competent counsel may be properly presumed to be fair and adequate"). Thus, a "strong presumption of fairness attaches to a settlement agreement when it is the result of this type of [arm's-length] negotiation." *In re Harnischfeger Indus., Inc.*, 212 F.R.D. 400, 410 (E.D. Wis. 2002).

3. The Relief Provided to the Settlement Class Is Adequate Taking into Account the Proposed Method of Distributing Relief and the Proposed Award of Attorneys' Fees (Rules 23(e)(2)(C)(ii)-(iii))

Rule 23(e)(2)(C)(i), which requires that "the relief provided for the class is adequate, taking into account the costs, risks, and delay of trial and appeal," has been discussed above. *See* § II.A.1, *supra*. Rule 23(e)(2)(C)(ii) considers whether the relief is adequate, taking into account the "effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims." The Settlement proceeds will be allocated to Settlement Class Members who submit valid Claims in accordance with the Plan of Allocation. *See* § III, *infra*. The Court-appointed Claims Administrator, JND Legal Administration ("JND"), will review and process all Claim Forms received, provide claimants with an opportunity to cure any deficiency in their claim or request review of the denial of their claim, and ultimately mail a check, or wire, to Authorized Claimants their *pro rata* share of the Net Settlement Fund as calculated under the Plan of Allocation, upon approval of the Court. This type of claims processing and method for distributing settlement proceeds is standard in securities and other class actions and is effective. Moreover, the Settlement is not "claims-made"—none of the Settlement will revert to Fenix.

The relief provided for the Settlement Class is also adequate considering the terms of the proposed award of attorneys' fees. Rule 23(e)(2)(C)(iii). As discussed in the accompanying Fee and Expense Application, the proposed attorneys' fees of 33⅓% are reasonable in light of the substantial

work and efforts of Lead Counsel, significant investment of resources in the case, their skillful prosecution of the action for the benefit of the Settlement Class, the risks that they faced, and the overall benefit of the Settlement achieved. Most importantly, with respect to the Court's consideration of the Settlement's fairness, the approval of attorneys' fees is entirely separate from approval of the Settlement; neither Plaintiffs nor Lead Counsel may terminate the Settlement based on the ultimate award of attorneys' fees or expenses.

4. Identification of Agreements in Connection with the Settlement (Rule 23(e)(2)(C)(iv) and Rule 23(e)(3))

The Parties entered into a confidential agreement establishing conditions under which Defendants may terminate the Settlement if a certain threshold of Settlement Class Members submit valid and timely requests for exclusion. This type of agreement is standard in securities class action settlements and has no negative impact on the fairness of the Settlement. *See Erica P. John Fund, Inc. v. Halliburton Co.*, 2018 WL 1942227, at *5 (N.D. Tex. Apr. 25, 2018) (approving settlement with similar confidential agreement).

5. The Settlement Treats Class Members Equitably Relative to Each Other (Rule 23(e)(2)(D))

Rule 23(e)(2)(D) requires that the Court assess whether "the proposal treats class members equitably relative to each other." Here, all Authorized Claimants will receive their *pro rata* share of the Net Settlement Fund based on the amount of their Recognized Loss calculated under the Plan of Allocation. Ex. 1-C (Notice at pp. 10-14); *see also* § III, *infra* (regarding Plan of Allocation). Accordingly, each of these factors favors approval of the Settlement.

III. THE PLAN OF ALLOCATION IS FAIR AND REASONABLE

The objective of a plan of allocation is to provide an equitable method for distributing a settlement fund among eligible class members. "The same standards of fairness, reasonableness and adequacy that apply to the settlement apply to the Plan of Allocation." *Retsky*, 2001 WL 1568856, at

*3. The proposed Plan of Allocation, developed by Plaintiffs' consulting damages expert in conjunction with Lead Counsel, reflects an assessment of the damages that Plaintiffs contend could have been recovered under the theories of liability asserted in the Action.[5] ¶94. More specifically, the Plan of Allocation reflects, and is based on, Plaintiffs' allegation that the price of Fenix's common stock was artificially inflated during the period from May 15, 2015 and June 28, 2017, inclusive, due to Defendants' alleged materially false and misleading statements and omissions. *Id.* The Plan of Allocation is based on the premise that the decreases in the price of Fenix common stock that followed the alleged corrective disclosures that occurred on October 12, 2016, March 28, 2017 and June 27, 2017 may be used to measure the alleged artificial inflation in the price of Fenix common stock prior to these disclosures. ¶95. The same methodology would have been proffered by Plaintiffs at summary judgment and trial had the Action not settled.

An individual Claimant's recovery under the Plan of Allocation will depend on a number of factors, including how many shares of Fenix common stock the Claimant purchased, acquired, or sold during the Settlement Class Period, when that Claimant bought, acquired, or sold the shares, and the number of valid claims filed by other Claimants. ¶96. If a Claimant has an overall market gain with respect to his, her, or its overall transactions in Fenix common stock during the Settlement Class Period, or if the Claimant purchased shares during the Settlement Class Period, but did not hold any of those shares through at least one of the alleged corrective disclosures, the Claimant's recovery under the Plan of Allocation will be zero, as any loss suffered would not have been caused by the revelation of the alleged fraud. ¶97.

As a result, Plaintiffs and Lead Counsel believe that the proposed Plan of Allocation will

[5] The Plan of Allocation is detailed in the Notice. *See* Ex. 1-C (Notice at pp. 10-14). The Notice is posted online at www.FenixSecuritiesLitigation.com, is downloadable, and may be mailed to Settlement Class Members upon request.

result in a fair and equitable distribution of the Net Settlement Fund among Settlement Class Members similar to the result if Plaintiffs prevailed at trial. To date, no objections to the Plan of Allocation have been filed on the Court's docket or received by Lead Counsel. ¶100. For these reasons, Plaintiffs respectfully requests that the Court approve the proposed Plan of Allocation.

IV. THE SETTLEMENT CLASS SHOULD BE FINALLY CERTIFIED

The Court's November 26, 2019 Preliminary Approval Order certified the Settlement Class for settlement purposes only under Fed. R. Civ. P. 23(a) and (b)(3). *See* ECF No. 137 at ¶1. There have been no changes to alter the propriety of class certification for settlement purposes. Thus, for the reasons stated in Plaintiffs' Unopposed Motion for Preliminary Approval of Settlement, (ECF No. 130), Plaintiffs respectfully request that the Court affirm its determinations in the Preliminary Approval Order certifying the Settlement Class under Rules 23(a) and (b)(3).

V. THE NOTICE PROGRAM SATISFIES RULE 23 AND DUE PROCESS

The notice program here satisfies the requirements of Rule 23 and due process. For any class certified under Rule 23(b)(3), due process and Rule 23 require that class members be given "the best notice 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); *see also Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173-75 (1974).

Courts routinely find that a combination of a mailed postcard directing the class to a more detailed online notice sufficient to satisfy due process requirements. *See In re Advanced Battery Techs., Inc. Sec. Litig.*, 298 F.R.D. 171, 183 n.3 (S.D.N.Y. 2014) (citing cases). In accordance with the Preliminary Approval Order, JND mailed, via first-class mail, over 10,000 copies of the Postcard Notice to potential Settlement Class Members who could be identified with reasonable effort, as well as brokerage firms and other nominees who regularly act as nominees for beneficial purchasers of securities. Ewashko Decl. ¶12. In addition, JND arranged for the Summary Notice to be published

in *Investor's Business Daily* on January 6, 2020, and transmitted over the *PR Newswire* on January 10, 2020. *Id.* at ¶15. The Notice provides all the necessary information required by Rule 23(c)(2)(B), including, in easily understandable language: (a) the nature of the action; (b) the Settlement Class Definition; (c) a description of the claims at issue and the defenses to those claims; (d) the ability of Settlement Class Members to enter an appearance through counsel; (e) the Settlement Class Member's ability to be excluded and the process for exclusion from the Settlement Class; (f) the binding effect of a Class judgment; (g) the contact information for Lead Counsel to answer questions; (h) the address for the Settlement website; and (i) instructions on how to access the case file in person.

Additionally, the notice program satisfies the requirements of the PSLRA, 15 U.S.C. §§ 77z-1(a)(7), 78u-4(a)(7) , by setting forth in plain, easily understandable language: (a) a cover page summarizing the information in the Notice; (b) a statement of plaintiff recovery, and the estimated recovery per damaged share; (c) a statement of potential outcomes of the case; (d) a statement of attorneys' fees or costs sought; (e) identification of lawyers' representatives; and the (vi) reasons for settlement.

In sum, the notice program fairly apprises Settlement Class Members of their rights with respect to the Settlement, and is the best notice practicable under the circumstances.

CONCLUSION

For all the foregoing reasons, Plaintiffs respectfully request that the Court approve the proposed Settlement and Plan of Allocation as fair, reasonable, and adequate; and finally certify the Settlement Class for the purposes of settlement.

Dated: January 31, 2020

GLANCY PRONGAY & MURRAY LLP

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CERTIFICATE OF SERVICE

I hereby certify that I caused a copy of the forgoing document to be filed on January 31, 2020, with the Clerk of the Court by using the CM/ECF system, which will send a notice of electronic filing to all attorneys appearing in this matter.

s/ Ex Kano S. Sams II
Ex Kano S. Sams II