UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

IN RE: SYNCHRONY FINANCIAL SECURITIES LITIGATION	No. 3:18-cv-1818-VAB

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

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In accordance with Fed. R. Civ. P. 23(e), Lead Plaintiff and Class Representative Stichting Depositary APG Developed Markets Equity Pool ("Lead Plaintiff" or "APG") and Plaintiff Stichting Depositary APG Fixed Income Credits Pool (collectively with Lead Plaintiff, "Plaintiffs"), on behalf of themselves and the Class, respectfully submit this memorandum of law in support of their motion for final approval of the proposed settlement of this Action (the "Settlement") and the proposed plan of allocation of the net proceeds of the Settlement (the "Plan of Allocation").[1]

PRELIMINARY STATEMENT

Subject to Court approval, Plaintiffs have agreed to settle all claims in this Action in exchange for a cash payment of $34,000,000, which Defendants have caused to be deposited into an escrow account. Plaintiffs respectfully submit that the proposed Settlement is fair, reasonable, and adequate; satisfies all the standards for final approval under Rule 23 of the Federal Rules of Civil Procedure; and should be finally approved by the Court.

Plaintiffs believe that the proposed Settlement is in the best interest of the Class, considering the range of possible outcomes of the litigation, including the significant risk that there might be no recovery at all. Following the Court's dismissal of the Action; the appeal of that decision to the Second Circuit which partially reversed the dismissal; and the Court's ruling on Defendants' renewed motion to dismiss, Plaintiffs' claims in the Action had been narrowed to just one alleged misstatement and one alleged corrective disclosure. Plaintiffs and the Class would

[1] Unless otherwise noted, all emphasis is added, all citations are omitted, and capitalized terms have the meanings given them in the Stipulation and Agreement of Settlement dated April 3, 2023 (ECF No. 232-2) (the "Stipulation"), or in the Declaration of Adam H. Wierzbowski in Support of: (A) Plaintiffs' Motion for Final Approval of Settlement and Plan of Allocation; and (B) Lead Counsel's Motion for Attorneys' Fees and Litigation Expenses (the "Wierzbowski Declaration" or "Wierzbowski Decl."), filed herewith. Citations herein to "¶__" and "Ex.__" refer, respectively, to paragraphs in, and exhibits to the Wierzbowski Declaration.

have faced significant litigation risks in establishing liability and damages on the surviving claim. Among other things, Plaintiffs would have confronted substantial hurdles in showing that Defendant Keane's January 19, 2018 statement that Synchrony was "not getting any pushback on credit" from its retail partners—even if found to be false or misleading—was material to investors' investment decisions. Defendants have asserted, and would continue to assert, that Keane's statement was an off-the-cuff comment delivered in response to a question on an investor call, and that Synchrony had disclosed substantial other information concerning its underwriting practices and relationships with its retail partners. ¶¶ 79-80. Plaintiffs would also have faced challenges in proving that Defendant Keane intended to mislead investors or acted recklessly in making the statement. ¶¶ 81-84. Finally, there would have been very significant challenges to establishing loss causation between Keane's statement and the remaining July 12, 2018 corrective disclosure. ¶¶ 85-92.

The July 12, 2018 disclosure concerned the termination of Synchrony's relationship with Walmart and one news article (in *The Wall Street Journal*) had noted that differences in underwriting approaches were a cause of the breakdown in the relationship. However, Defendants had substantial arguments that the price decline in Synchrony stock on July 12 was caused by the news of Synchrony's potential loss of the Walmart relationship—not the disclosure of the alleged falsity of Keane's statement—including because there were various other reasons for the deterioration of the Walmart relationship. ¶ 90. Defendants would also likely assert that the stock price decline largely occurred in reaction to earlier news that Walmart was considering ending its partnership with Synchrony, not in response to the *WSJ*'s article explanation for the reasons for the termination. ¶ 89.

In the absence of the Settlement, Plaintiffs and the Class faced the prospect of additional protracted litigation, including the completion of fact discovery (which would have entailed at least a dozen fact depositions), substantial expert discovery, an expected motion for summary judgment, a complex trial, and post-trial motions on both liability and damages, as well as the inevitable additional appeals. The Settlement avoids these significant risks and delays while providing a meaningful, certain, and near-term benefit of $34 million to the Settlement Class.

As detailed in the Wierzbowki Declaration,[2] the Settlement is the result of Plaintiffs' and Lead Counsel's substantial litigation efforts over the past four years. This effort started with Plaintiffs' extensive investigation of the alleged fraud through the review of public information such as filings with the SEC, analyst reports, conference call transcripts, and news articles. ¶ 19. Lead Counsel also located and interviewed dozens of former Synchrony employees regarding the events at issue. ¶ 20. Drawing on this extensive investigation, Plaintiffs prepared a detailed consolidated complaint (the "Complaint"). ¶¶ 22-24. Lead Counsel then opposed Defendants' motion to dismiss the Complaint, through extensive briefing and in oral argument before the Court. ¶¶ 25-27, 31. After the Court dismissed the Complaint with prejudice, Plaintiffs prosecuted an appeal to the Second Circuit that resulted in a partial reversal. ¶¶ 34-36. Following remand to this Court, Plaintiffs successfully defeated Defendants' renewed motion to dismiss; conducted substantial fact discovery, including obtaining approximately 300,000 pages of documents from Defendants and non-parties; and prepared and filed Plaintiffs' motion for class certification. ¶¶ 37-57. As a result of this substantial litigation, Plaintiffs and Lead Counsel had a thorough and well-

[2] The Wierzbowski Declaration is an integral part of this submission and, for the sake of brevity in this memorandum, the Court is respectfully referred to it for a detailed description of, among other things: the history of the Action (¶¶ 14-69); the nature of the claims asserted (¶¶ 22-24); the negotiations leading to the Settlement (¶¶ 61-67); the risks and uncertainties of continued litigation (¶¶ 70-98); and the terms of the Plan of Allocation for the Settlement proceeds (¶¶ 105-116).

developed understanding of the strengths and weaknesses of the case when the Settlement was reached.

The Settlement is also the result of extended settlement negotiations between experienced counsel, which included two mediation sessions with an experienced mediator. In the summer of 2022, after Defendants' renewed motion to dismiss had been denied (and while discovery was ongoing), the Parties agreed to engage in private mediation and retained Jed D. Melnick, Esq., of JAMS to act as mediator in the Action. ¶ 61. The Parties exchanged detailed mediation statements and supporting exhibits, which were submitted to Mr. Melnick, and on July 26, 2022, participated in the first full-day mediation session. ¶¶ 62-63. While no agreement was reached at the session, the Parties continued their negotiations and held a second mediation session on December 12, 2022. ¶¶ 63-65. The Parties again did not reach an agreement at the mediation session, but the Parties continued their settlement negotiations over the following weeks. On December 29, 2022, Mr. Melnick made a mediator's proposal that the Parties settle the Action for $34 million, which the Parties accepted on January 2, 2023. ¶¶ 65-66. The Parties memorialized the terms of their agreement in principle in a Memorandum of Understanding on January 17, 2023, and, following additional negotiations regarding the specific terms of the Settlement, executed the Stipulation on April 3, 2023. ¶¶ 66-67.

On April 12, 2023, the Court preliminarily approved the Settlement, finding it likely that the Court could approve the Settlement at final approval. *See* Preliminary Approval Order (ECF No. 233), at ¶ 1. The Settlement has the full support of Plaintiffs—who are experienced and sophisticated investors—and the reaction of the Class to date has been positive. While the deadline for objections has not yet passed, following the dissemination of more than 156,000 Notices to potential Class Members and nominees, as well as publication of a Summary Notice in two high-

circulation financial publications, no objections and just one request for exclusion have been received. *See* ¶ 104; Villanova Decl. (Ex. 2), at ¶ 13. Accordingly, and as further discussed below, Plaintiffs respectfully submit that the Settlement is fair, reasonable, and adequate, and merits final approval by the Court.

Additionally, Plaintiffs request that the Court approve the Plan of Allocation, which is set forth in the Notice. The Plan of Allocation, which Lead Counsel developed in consultation with Plaintiffs' damages expert, provides a reasonable method for allocating the Net Settlement Fund among Class Members who submit valid claims based on damages they suffered on their transactions in Synchrony common stock related to the alleged fraud.

ARGUMENT

I. THE PROPOSED SETTLEMENT MERITS FINAL APPROVAL

Federal Rule of Civil Procedure 23(e) requires judicial approval for any compromise or settlement of class-action claims. *See* Fed. R. Civ. P. 23(e). A class-action settlement merits approval where the court finds it "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2); *See also In re Frontier Commc'ns Corp.*, 2022 WL 4080324, at *5 (D. Conn. May 20, 2022).

The Second Circuit has recognized that public policy favors settlement, particularly in class actions. *See 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. The compromise of complex litigation is encouraged by the courts and favored by public policy."); *In re Facebook, Inc., IPO Sec. & Derivative Litig.*, 343 F. Supp. 3d 394, 408 (S.D.N.Y. 2018) (same).

"In determining whether a settlement is fair, reasonable, and adequate, the District Court examines the 'negotiating process leading up to the settlement[, *i.e.*, procedural fairness,] as well as the settlement's substantive terms[, *i.e.*, substantive fairness]." *McReynolds v. Richards-*

Cantave, 588 F.3d 790, 803-04 (2d Cir. 2009) (quoting *D'Amato v. Deutsche Bank*, 236 F.3d 78, 85 (2d Cir. 2001)) (alterations in *McReynolds*); *see also Frontier*, 2022 WL 4080324, at *10 (same).

Rule 23(e)(2) provides that courts should determine whether a proposed settlement is "fair, reasonable, and adequate" after considering whether:

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

Fed. R. Civ. P. 23(e)(2).

In addition, the Second Circuit has historically held that courts should consider the following factors from *City of Detroit v. Grinnell Corp.* in evaluating class settlements:

> (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). The advisory committee notes to the 2018 amendments to Rule 23 note that the four factors set forth in Rule 23(e)(2) are not intended to "displace" any factor previously adopted by a Court of Appeals, but "rather [seek] to focus the court and the lawyers on the core concerns of procedure and substance that should guide the decision whether to approve the proposal." Fed. R. Civ. P. 23(e)(2) Advisory Committee Notes to 2018 Amendment.

Accordingly, and consistent with the practice of courts in this Circuit, Plaintiffs will discuss herein the Settlement's "fairness, reasonableness, and adequacy" principally under the four factors listed in Rule 23(e)(2), while also discussing relevant and non-duplicative *Grinnell* factors. *See, e.g.*, *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 330 F.R.D. 11, 29 (E.D.N.Y. 2019) ("the new Rule 23(e) factors to add to, rather than displace, the *Grinnell* factors"). As discussed below, all of these factors strongly support finally approval here.

A. Lead Plaintiff and Lead Counsel Have Adequately Represented the Class

In weighing approval, a court should consider whether "the class representatives and class counsel have adequately represented the class." Fed. R. Civ. P. 23(e)(2)(A); *see also In re Barrick Gold Sec. Litig.*, 314 F.R.D. 91, 99 (S.D.N.Y. 2016) ("the adequacy requirement 'entails inquiry as to whether: (1) plaintiffs' interests are antagonistic to the interest of other members of the class and (2) plaintiffs' attorneys are qualified, experienced and able to conduct the litigation'").

As the Court recently recognized in appointing Lead Plaintiff as Class Representative for the Class in its February 3, 2023 Order, Lead Plaintiff is an adequate representative of the Class because there is no antagonism or conflict between the interests of Lead Plaintiff and the Class, and Lead Plaintiff has retained well-qualified and experienced counsel to conduct the litigation. ECF No. 231, at 10-12. Among other things, the Court found that:

> the Lead Plaintiff does not have any apparent antagonistic interests; the Lead Plaintiff has actively participated in the litigation to date, . . . and the Lead Plaintiff has "sizeable interest in this case . . . as well as its position as a sophistical institutional investor," [and thus] the adequacy requirement as it relates to the Lead Plaintiff is satisfied
>
> Additionally, the Lead Plaintiff has selected two firms—BLB&G and Motley Rice—that are highly experienced in securities class actions. . . . BLB&G and Motley Rice have both, to date, conducted this litigation competently, including opposing two motions to dismiss and arguing the case on appeal at the Second Circuit.

Id. at 11-12. Indeed, Lead Counsel respectfully submit that Plaintiffs' Counsel have vigorously represented the Class by prosecuting the Action for over four years against highly regarded opposing counsel. Lead Plaintiff and Lead Counsel have continued to adequately represent the Class though vigorous arm's length settlement negotiations to obtain a favorable $34 million recovery for the Class. The fact that Lead Plaintiff and Lead Counsel have adequately represented the Class support final approval of the Settlement.

B. The Settlement Is Entitled to a Presumption of Fairness Because It Was Reached After Arm's-Length Negotiations Between Experienced Counsel with the Benefit of Substantial Discovery and the Assistance of an Experienced Mediator

The Court should also consider whether the settlement "was negotiated at arm's length." Fed. R. Civ. P. 23(e)(2)(B). Courts have traditionally considered other related circumstances in determining the "procedural" fairness of a settlement, including: (i) counsel's understanding of the strengths and weakness of the case based on factors such as "the stage of the proceedings and the amount of discovery completed," *Grinnell*, 495 F.2d at 462-63, (ii) the "absence of any indication of collusion" in the settlement negotiations, *Weinberger v. Kendrick*, 698 F.2d 61, 74 (2d Cir. 1982); and (iii) the involvement of a mediator, *D'Amato*, 236 F.3d at 85. These circumstances strongly support the approval of the Settlement here, as the Parties reached the Settlement only after months of arm's-length negotiations by experienced counsel with the benefit of substantial discovery and with the assistance of an experienced mediator.

Beginning in the summer of 2022, the Parties explored the possibility of resolving the litigation through settlement. The Parties agreed to engage in private mediation and retained Jed D. Melnick, an experienced mediator affiliated with JAMS, to act as mediator in the Action. The Parties held two full-day mediation sessions with Mr. Melnick, in July 2022 and December 2022. ¶¶ 63, 65. The mediation process included the exchange of detailed mediation statements that

addressed the issues of liability and damages, and a presentation by Plaintiffs' counsel summarizing certain evidence they had gathered in discovery. ¶¶ 62-65. The Parties did not reach an agreement at either of the mediation sessions, but the Parties made progress and continued intense settlement negotiations in the weeks following the second session. In late December 2022, Mr. Melnick provided a mediator's recommendation that the Parties settle the Action for $34 million, which the Parties accepted. ¶¶ 65-66.

As an initial matter, the fact that the Parties reached the Settlement after arm's-length negotiations between experienced counsel after conducting meaningful discovery creates a presumption of its fairness. *See Wal-Mart*, 396 F.3d at 116 ("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."); *Frontier*, 2022 WL 4080324, at *10 (same); *Woburn Ret. Sys. v. Salix Pharms., Ltd.*, 2017 WL 3579892, at *2 (S.D.N.Y. Aug. 18, 2017) (a presumption of fairness will apply where "settlement is achieved through arm's-length negotiations, between experienced and capable counsel").

The active role played in the settlement negotiations by an experienced mediator such as Mr. Melnick—and the fact that the Settlement was based on his recommendation—also strongly support a finding that the Settlement is procedurally fair. *See, e.g.*, *D'Amato*, 236 F.3d at 85 (a mediator's involvement in settlement negotiations "helps to ensure that the proceedings were free of collusion and undue pressure"); *Yang v. Focus Media Holding Ltd.*, 2014 WL 4401280, at *5 (S.D.N.Y. Sept. 4, 2014) (participation of highly qualified mediator "strongly supports a finding that negotiations were conducted at arm's length and without collusion.").

Moreover, the Parties and their counsel were well informed about the strengths and weaknesses of the case before they agreed to settle. Here, for example, Plaintiffs and Lead Counsel

conducted a thorough pre-filing investigation by extensively reviewing SEC filings, analyst reports, investor call transcripts, and news articles, and by identifying and interviewing dozens of former Synchrony employees regarding the events at issue. ¶¶ 19-20. In addition, Plaintiffs and Lead Counsel consulted extensively with experts in financial economics and conducted extensive research to analyze and understand the relevant law and facts as part of their briefing of the numerous issues raised in the Defendants' motions to dismiss, and Plaintiffs' appeal to the Second Circuit. ¶¶ 21, 25-26, 34-36, 59. Finally, following remand from the Second Circuit, Plaintiffs conducted substantial fact discovery resulting in the production of approximately 300,000 pages of documents. ¶¶ 41-56. Accordingly, when the Parties reached their agreement to settle the Action, Plaintiffs and Lead Counsel had sufficient information to evaluate their case and the adequacy of the proposed Settlement.

Plaintiffs themselves strongly support the Settlement, further weighing in favor of approval. *See* Declaration of Albert H. van Lidth de Jeude (Ex. 1) at ¶ 6. A settlement reached "under the supervision and with the endorsement of a sophisticated institutional investor is . . . 'entitled to an even greater presumption of reasonableness.'" *In re Veeco Instruments Inc. Sec. Litig.*, 2007 WL 4115809, at *5 (S.D.N.Y. Nov. 7, 2007). Likewise, the informed judgment of Lead Counsel, which is highly experienced in securities litigation, that the Settlement is fair and reasonable is entitled to "great weight." *See Frontier*, 2022 WL 4080324, at *10 (the Court "affords 'great weight' to Lead Counsel's recommendation in light of their being 'most closely acquainted with the facts of the underlying litigation.") (quoting *In re NASDAQ Market-Makers Antitrust Litig.*, 187 F.R.D. 465, 474 (S.D.N.Y. 1998)). Lead Counsel here strongly endorses the Settlement as fair and reasonable and in the best interests of the Class. ¶¶ 5, 98.

C. The Proposed Settlement Is Fair, Reasonable, and Adequate In Light of the Costs and Risks of Further Litigation and Similar Factors

In determining whether a class action settlement is "fair, reasonable, and adequate," the Court must also consider whether "the relief provided for the class is adequate, taking into account . . . the costs, risks, and delay of trial and appeal." Fed. R. Civ. P. 23(e)(2)(C). In most cases, this will be the most important factor in analyzing a proposed settlement. *See Grinnell*, 495 F.2d at 455 ("most important factor" is "strength of the case for plaintiffs on the merits, balanced against the amount offered in settlement.").[3]

As a threshold matter, courts "have long recognized that [securities class action] litigation is notably difficult and notoriously uncertain." *In re FLAG Telecom Holdings, Ltd. Sec. Litig.*, 2010 WL 4537550, at *15 (S.D.N.Y. Nov. 8, 2010); *see also In re Sturm, Ruger, & Co. Sec. Litig.*, 2012 WL 3589610, at *5 (D. Conn. Aug. 20, 2012) ("In evaluating the settlement of a securities class action, federal courts . . . have long recognized that such litigation is notably difficult and notoriously uncertain."). Accordingly, such suits "readily lend themselves to compromise because of the difficulties of proof, the uncertainties of the outcome, and the typical length of the litigation." *In re Luxottica Grp. S.p.A. Sec. Litig.*, 233 F.R.D. 306, 310 (E.D.N.Y. 2006). This case was no exception.

Absent the Settlement, the continued litigation of the Action would have required the Parties to continue fact discovery, conduct numerous fact and expert depositions, and engage in

[3] Indeed, this factor under Rule 23(e)(2)(C) essentially encompasses at least six of the nine factors of the traditional *Grinnell* analysis. *See Grinnell*, 495 F.2d at 463 ("(1) the complexity, expense and likely duration of the litigation; . . . (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining the class action through the trial; . . . (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").

substantial expert discovery. Additionally, the Parties would have likely briefed and argued a motion for summary judgment by Defendants as well as *Daubert* challenges to expert testimony. Even assuming Plaintiffs successfully overcame these challenges, Plaintiffs would need to prevail at a complex trial, and on pre- and post-trial motions. Plaintiffs faced these numerous and significant risks, which necessarily involved substantial costs and delays, all without any assurance of obtaining a better (or indeed any) recovery. ¶¶ 70-98. Given the meaningful litigation risks, and the immediacy and amount of the $34,000,000 recovery, Plaintiffs and Lead Counsel believe that the Settlement is fair, reasonable, and adequate, and is in the best interest of the Class. ¶ 98.

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

Plaintiffs believe that their claims are meritorious, but they recognize that this Action presented several substantial risks to establishing both liability and damages. Indeed, the Court had initially dismissed the Action in its entirety and the Court of Appeals had only reversed the Court's dismissal as to one alleged misstatement and only under the Exchange Act. Even after the Second Circuit's ruling, on Defendants' renewed motion to dismiss, the Court sustained Plaintiffs' Exchange Act claims only as to that single misstatement and then still *further* narrowed Plaintiffs' claims to just the first corrective disclosure, shortening the scope of the alleged class period nearly in half. Given the narrowness of Plaintiffs' remaining case, each stage in the litigation would pose increased risk because any failure to prove any of the required elements of the securities fraud claim for the January 19, 2018 statement would result in a complete dismissal of the Action. Therefore, the risks of continued litigation were heightened, and the ultimate potential for recovery for the Class was greatly reduced.

(a) Risks to Proving Liability

To prevail through litigation, Plaintiffs would have been required to prove (i) that Defendant Keane's January 19, 2018 statement that Synchrony was "not getting any pushback on credit" was materially false and misleading when made; (ii) that Defendants knew or recklessly disregarded that this statement was false when made (*i.e.*, Defendants acted with "scienter"); (iii) that the revelation of the truth concerning Keane's alleged misstatement caused the loss suffered by Plaintiffs and the Class (*i.e.*, loss causation); and (iv) the amount of class-wide damages. Defendants would have had substantial arguments concerning each of these issues.

First, Defendants have argued, and would continue to argue, that Keane's January 19, 2018 comments did not contain any materially false or misleading statements or omissions and, in any event, the statement at issue was an unscripted remark that was not material to investors. ¶¶ 79-80. Defendants would have contended (as they had previously argued) that Ms. Keane's "pushback" statement was an "off-the-cuff" statement she made in response to a specific question from one investor analyst during a conference call, and that a reasonable investor would not find such a statement important. ¶ 79. In addition, Defendants would have argued that Synchrony made multiple disclosures to investors during the relevant period related to its underwriting standards and potential disagreements with retail partners, competition from other major financial institutions, and the possibility of losing key retail partnerships. ¶ 80. Defendants would have argued that, given the context of these other disclosures, no reasonable investor could have interpreted Ms. Keane's statement to be an assurance about the state of thousands of retail partnerships or any particular partnership renewal negotiation. *Id.* These arguments posed meaningful risk that a factfinder might determine that Ms. Keane's statement was too immaterial to be actionable, even if otherwise found to be false or misleading. *Id.*

In addition, Defendants would contend that the alleged misstatement was not made with "scienter" as required under the Exchange Act. Defendants would have argued that Defendant Keane did not have fraudulent intent to mislead investors and that, it was, at worst, a simple misunderstanding. ¶¶ 81-83. Defendants would have attempted to establish that the true meaning of Ms. Keane's statement about "pushback on credit" was specific to the context of Synchrony's Q1 2018 Earnings Call and was inconsistent with Plaintiffs' theory of liability. ¶ 81. Defendants would also continue to argue that Plaintiffs could not establish a motive to commit fraud. ¶ 82.

(b) Risks Concerning Loss Causation and Damages

Plaintiffs also faced substantial risks to establishing loss causation and proving damages. Defendants would argue that Plaintiffs could not establish loss causation because, they would claim, the remaining corrective disclosure was not corrective of the sole remaining alleged misstatement, and so Defendants' alleged fraud could not have caused the losses suffered by the Class. Specifically, Defendants would argue that Synchrony's July 12, 2018 stock price drop was caused by other news disclosed that day—not the corrective disclosure alleged by Plaintiffs—and was unrelated to the allegedly misstated or omitted information in Keane's January 2018 statement. ¶¶ 86-88. Defendants would further argue that, even to the extent the stock drop that day related to news of Synchrony's worsening relationship with Walmart, the reasons for that deteriorating relationship were unrelated to Synchrony's tightening of its underwriting standards or any other information allegedly misstated or omitted by Keane, and thus Defendants' alleged fraud did not cause any losses. ¶¶ 88-90. Defendants were also expected to argue that a portion of the share price decline on July 12, 2018 occurred before *The Wall Street Journal* published any of the specific facts concerning Walmart's desire for a higher underwriting approval rate. Defendants would argue that, instead, Synchrony's stock price had dropped in response to earlier press reports which only revealed that Walmart was considering ending the partnership and did

not mention underwriting at all. ¶ 89. Accordingly, Defendants would argue that the price decline on July 12 could not have been causally connected to any revelation related to Ms. Keane's alleged misstatement. *Id*.

In addition, the other potential explanations for the non-renewal of Walmart's relationship with Synchrony would create the risk that any losses associated with the stock price decline would need to be allocated among these various causes. ¶ 90. Accordingly, Defendants would have challenged Plaintiffs' alleged damages and argued that all, or a significant portion, of Synchrony's stock price decline was not recoverable as damages. Proving what portion (if any) of the price declines at issue resulted from the revelation of alleged misstatement—rather than other, confounding information—would have been subject to continued disputes between experts through trial. ¶ 92.

Indeed, Defendants would undoubtedly have presented a well-qualified expert who would opine that the Class's damages were small or nonexistent. While Plaintiffs would have had their own well-qualified expert on these issues, there is no way to predict with any degree of certainty which expert's opinions the jury would have accepted. Had the jury accepted some or all of Defendants' expert's views, damages would been materially reduced, and potentially eliminated. The Settlement eliminates those risks and provides a certain recovery for the Class. *See In re Facebook Inc. IPO & Sec. Litig.*, 2015 WL 6971424, at *5 (S.D.N.Y. Nov. 9, 2015) ("[D]amages would be subject to a battle of the experts, with the possibility that a jury could be swayed by experts for Defendants, who could minimize or eliminate the amount [of] Plaintiffs' losses. Under such circumstances, a settlement is generally favored over continued litigation."); *Veeco*, 2007 WL 4115809, at *9 ("a very lengthy and complex battle of the parties' experts likely would have ensued at trial, with unpredictable results. These risks as to liability strongly militate in favor of the

Settlement."); *In re Priceline.com, Inc. Sec. Litig.*, 2007 WL 2115592, at *3-4 (D. Conn. July 20, 2007) (the risks of proving liability supported settlement, where plaintiffs would face obstacles in proving damages, which would be dependent upon the "jury's reaction to and interpretation of conflicting expert opinions" that "would be difficult to predict with any certainty").

* * *

In sum, Plaintiffs faced substantial risks to proving the liability, including loss causation, and damages. And, of course, even if Plaintiffs prevailed at summary judgment and trial, Defendants would likely have filed post-trial motions and appeals, thereby likely leading to additional years of litigation. *See, e.g.*, *Robbins v. Koger Props., Inc.*, 116 F.3d 1441, 1448-49 (11th Cir. 1997) (jury verdict of $81 million for plaintiffs against accounting firm reversed on appeal on causation grounds, and judgment entered for defendant). The presence of such risks further weighs strongly in favor of approving the Settlement.

2. The Settlement Is Also Fair and Reasonable in Light of Realistically Recoverable Damages

Plaintiffs submit that the $34 million Settlement is also a favorable result when considered in relation to the maximum damages that a plaintiff could realistically establish at trial. Plaintiffs' damages expert has estimated that ***maximum*** potential damages in this case are approximately $211 to $305 million. ¶ 95. However, this estimated amount assumes Plaintiffs' complete success in establishing Defendants' liability, and further that the trier of fact would reject Defendants' loss causation and damages arguments. *Id*. The $34 million Settlement therefore represents 11% to 16% of the maximum reasonably recoverable damages, which represents a very positive result in light of the Action's significant litigation risks.

Indeed, the recovery here is higher than that frequently seen in other securities class actions. *See Frontier*, 2022 WL 4080324, at *14 (approving settlement representing "7% of the estimated

maximum recoverable damages," as "reasonable in light of the risks of litigation"); *Menkes v. Stolt-Nielsen S.A.*, 270 F.R.D. 80, 103 (D. Conn. 2010) (granting preliminary approval of settlement representing approximately 8% of maximum recoverable damages); *Sturm, Ruger, & Co.*, 2012 WL 3589610, at *7 (approving settlement that represented approximately 3.5% of estimated damages, which exceeded the average recovery in shareholder litigation); *In re Canadian Superior Sec. Litig.*, 2011 WL 5830110, at *2 (S.D.N.Y. Nov. 16, 2011) (approving settlement representing 8.5% of maximum damages, which court noted "exceed[s] the average recovery in shareholder litigation"); *In re China Sunergy Sec. Litig.*, 2011 WL 1899715, at *5 (S.D.N.Y. May 13, 2011) ("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. Rsch. Reports Sec. Litig.*, 2007 WL 313474, at *10 (S.D.N.Y. Feb. 1, 2007) (approving recovery of 6.25%, which was "at the higher end of the range of reasonableness").

3. Synchrony's Ability to Withstand a Greater Judgment

Plaintiffs believe that Synchrony would have the ability to pay a judgment in excess of the $34 million Settlement Amount. However, "defendants' ability to withstand a higher judgment . . . standing alone, does not suggest that the settlement is unfair." *D'Amato*, 236 F.3d at 86 n.15. A "defendant is not required to 'empty its coffers' before a settlement can be found adequate." *In re IMAX Sec. Litig.*, 283 F.R.D. 178, 191 (S.D.N.Y. 2012). Indeed, courts have repeatedly recognized that this *Grinnell* factor, standing alone, does not weigh against approval of a settlement where, as here, the other factors weigh in favor of approving the Settlement. *See Frontier*, 2022 WL 4080324, at *13 ("given the application of the other *Grinnell* factors in this case, the Court need not determine whether Defendants could have withstood a larger judgment

and may still approve the settlement agreement"); *FLAG Telecom*, 2010 WL 4537550, at *19 ("the mere ability to withstand a greater judgment does not suggest the settlement is unfair").

4. The Costs and Delays of Continued Litigation Support Approval of the Settlement

As noted above, the time and costs involved in continuing to litigate through the completion of fact and expert discovery (including depositions), and summary judgment—let alone through a trial and the inevitable post-trial motions and appeals—would have been ***very*** substantial. Indeed, it is widely recognized that "[s]ecurities class actions are generally complex and expensive to prosecute." *In re Gilat Satellite Networks, Ltd.*, 2007 WL 1191048, at *10 (E.D.N.Y. Apr. 19, 2007). Accordingly, this factor also weighs in favor of approval.

5. All Other Rule 23(e)(2)(C) Factors Also Support Approval

Rule 23(e)(2)(C) also instructs courts to consider whether the relief provided for the Class is adequate in light of "the effectiveness of any proposed method of distributing relief to the Class, including the method of processing class-member claims;" "the terms of any proposed award of attorney's fees, including timing of payment;" and "any agreement required to be identified under Rule 23(e)(3)." Fed. R. Civ. P. 23(e)(2)(C)(ii)-(iv). These factors also support final approval.

First, the procedures for processing Class Members' claims and distributing the Settlement's proceeds to eligible claimants in cases of this type are well-established. In sum, the net Settlement proceeds will be distributed to eligible Class Members who submit required Claim Forms and supporting documentation to the Court-appointed Claims Administrator, Epiq Global ("Epiq")—a highly experienced claims administration firm. Epiq will (a) review and process submitted Claims under the supervision of Lead Counsel, (b) provide Claimants with an opportunity to cure any deficiencies and bring any unresolved Claims disputes to the Court, and (c) ultimately send claimants their *pro rata* share of the Net Settlement Fund (following entry of a

final "Class Distribution Order" by the Court).[4] This type of claims processing is standard in securities class actions, as neither Plaintiffs nor Synchrony possess individual investors' trading data that would otherwise allow the Parties to create a "claims-free" process to distribute Settlement funds.

Second, the relief provided by the Settlement remains adequate upon consideration of the terms of the proposed award of attorneys' fees. As discussed in the accompanying Fee Memorandum, the requested attorneys' fees of 13% of the Settlement Fund, to be paid upon the Court's approval, are fair and reasonable. Of particular note, the approval of the attorneys' fee award is entirely separate from the approval of the Settlement, and neither Plaintiffs nor Lead Counsel may terminate the Settlement based on this Court's or any appellate court's ruling with respect to attorneys' fees. *See* Stipulation ¶ 15.

Lastly, as previously disclosed, the only agreement the Parties entered into in addition to the initial Memorandum of Understanding and the Stipulation was a confidential Supplemental Agreement entered into between Plaintiffs and Synchrony that provides Synchrony with the option to terminate the Settlement in the event Class Members who timely and validly request exclusion from the Class meet a certain threshold. *See* Stipulation ¶ 35. This type of agreement is "a standard provision in securities class actions and has no negative impact on the fairness of the Settlement." *In re Signet Jewelers Ltd. Sec. Litig.*, 2020 WL 4196468, at *13 (S.D.N.Y. July 21, 2020).

D. The Settlement Treats Class Members Equitably Relative to Each Other

Rule 23(e)(2)(D) requires that the Court assess whether "the proposal treats class members equitably relative to each other." Fed. R. Civ. P. 23(e)(2)(D). As discussed below in Part II, under

[4] The Settlement is not a claims-made settlement. If the Settlement is approved, Defendants will have no right to the return of any portion of Settlement based on the number or amount of Claims submitted. *See* Stipulation ¶ 12.

the Plan of Allocation, eligible Claimants approved for payment by the Court will receive their *pro rata* share of the recovery based on the amount and timing of their transactions in Synchrony common stock. Plaintiffs will receive the same level of *pro rata* recovery, calculated under the same Plan of Allocation provisions, as all other Class Members.

E. The Reaction of the Class to the Settlement Favors Approval

Another *Grinnell* factor to be considered is the reaction of the class to the Settlement. *See, e.g.*, *Frontier*, 2022 WL 4080324, at *12; *In re Bear Stearns Cos., Inc. Sec., Derivative, & ERISA Litig.*, 909 F. Supp. 2d 259, 266-67 (S.D.N.Y. 2012); *FLAG Telecom*, 2010 WL 4537550, at *15-16. The July 10, 2023 deadline set by the Court for Class Members to object or exclude themselves from the Class has not yet passed, but to date, no objections to the Settlement and just one request for exclusion have been received. ¶ 104; Villanova Decl. ¶ 13. As provided in the Preliminary Approval Order, Plaintiffs will address any objections and requests for exclusion that may be received in their reply papers (which are to be filed by July 24, 2023).

II. THE PLAN OF ALLOCATION SHOULD BE APPROVED

A plan for allocating settlement proceeds, like the settlement itself, should be approved if it is fair, reasonable, and adequate. *See IMAX*, 283 F.R.D. at 192; *Bear Stearns*, 909 F. Supp. 2d at 270. A plan of allocation is fair and reasonable as long as it has a "rational basis." *Signet Jewelers*, 2020 WL 4196468, at *13; *FLAG Telecom*, 2010 WL 4537550, at *21. Generally, a plan of allocation that reimburses class members based on the relative strength and value of their claims is reasonable. *See Signet*, 2020 WL 4196468, at *13. In determining whether a plan of allocation is reasonable, "courts give great weight to the opinion of experienced counsel." *Id.*; *see also Priceline.com*, 2007 WL 2115592, at *4 ("[T]he adequacy of an allocation plan turns on whether counsel has properly apprised itself of the merits of all claims, and whether the proposed settlement is fair and reasonable in light of that information.").

Here, the proposed Plan of Allocation (or "Plan") was developed by Lead Counsel in consultation with Plaintiffs' damages expert and was set forth in full in the Notice mailed to potential Class Members. *See* Villanova Decl. (Ex. 2), Ex. A, at 14-17. Lead Counsel respectfully submits that the Plan provides a fair and reasonable method to allocate the Net Settlement Fund among Class Members who submit valid Claim Forms, based on the damages they suffered on their investments in Synchrony common stock related to the alleged fraud. ¶¶ 106-107.

The Plan calculates a Recognized Loss Amount for each purchase or acquisition of Synchrony common stock during the Class Period. ¶ 110. Plaintiffs' damages expert calculated the estimated amounts of artificial inflation in the price of Synchrony common stock that allegedly was proximately caused by Defendants' alleged materially false and misleading statements and omissions—the traditional method for measuring damages under Section 10(b) of the Exchange Act. ¶ 109. In general, Recognized Loss Amounts under the Plan are calculated as the lesser of: (a) the difference between the amount of alleged artificial inflation at the time of purchase or acquisition and the time of sale, or (b) the difference between the purchase price and the sale price for the shares. ¶ 110. Claimants who purchased and sold all their Synchrony shares before the corrective disclosure occurred on July 12, 2018 will have no Recognized Loss Amount under the Plan of Allocation with respect to those transactions, because any loss suffered on those sales would not be the result of the alleged misstatements in the Action. *Id.*[5]

The sum of a claimant's Recognized Loss Amounts for all purchases and acquisitions of Synchrony common stock during the Class Period is the Claimant's "Recognized Claim," and the

[5] In addition, consistent with PSLRA, Recognized Loss Amounts for shares of Synchrony common stock sold during the 90-day period after the end of the Class Period, or held to the end of that 90-day period, are further limited to the difference between the purchase price and the average closing price of the stock during that period. ¶ 111.

Net Settlement Fund will be allocated to Authorized Claimants on a *pro rata* basis based on the relative size of their Recognized Claims. ¶¶ 112-113.

Under the Plan of Allocation, the entire Net Settlement Fund will be distributed to Authorized Claimants. If any funds remain after the initial *pro rata* distribution, as a result of uncashed or returned checks or other reasons, subsequent cost-effective distributions to Authorized Claimants will be conducted. Only when the residual amount left for re-distribution to Class Members is so small that a further re-distribution would not be cost effective (for example, where the administrative costs of conducting the additional distribution would largely subsume the funds available), will those funds be donated to one or more non-sectarian, not-for-profit, 501(c)(3) organizations, to be recommended by Lead Counsel and approved by the Court. ¶ 114.

Lead Counsel believes that the Plan of Allocation provides a fair and reasonable method to equitably allocate the Net Settlement Fund among Class Members who suffered losses as a result of the conduct alleged in the Action. ¶ 116. Moreover, as noted above, as of June 23, 2023, more than 156,000 copies of the Notice, which contained the Plan of Allocation and advised Class Members of their right to object to the Plan of Allocation, had been sent out—yet no objections to the proposed Plan have been received. *See* ¶ 115; Villanova Decl. ¶ 7.

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

The Notice to the Class satisfied the requirements of Rule 23(c)(2)(B), which requires "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); *see also Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173-75 (1974). The Notice also satisfied Rule 23(e)(1), which requires that notice of a settlement be "reasonable"—i.e., it must "fairly apprise the prospective

members of the class of the terms of the proposed settlement and of the options that are open to them in connection with the proceedings." *Visa*, 396 F.3d at 114.

Both the substance of the Notice and the method of its dissemination to potential members of the Class satisfied these standards. The Court-approved Notice includes all the information required by Federal Rule of Civil Procedure 23(c)(2)(B) and the PSLRA, 15 U.S.C. § 78u-4(a)(7), including: (i) an explanation of the nature of the Action and the claims asserted; (ii) the definition of the Class; (iii) the amount of the Settlement; (iv) a description of the Plan of Allocation; (v) an explanation of the reasons why the Parties are proposing the Settlement; (vi) a statement indicating the attorneys' fees and costs that will be sought; (vii) a description of Class Members' right to opt-out of the Class or to object to the Settlement, the Plan of Allocation, or the requested attorneys' fees or expenses; and (viii) notice of the binding effect of a judgment on Class Members.

As noted above, in accordance with the Court's Preliminary Approval Order, the Court-approved Claims Administrator (Epiq), began mailing copies of the Notice Packet to potential Class Members on May 5, 2023. *See* Villanova Decl. ¶¶ 3-4. As of June 23, 2023, Epiq had disseminated 156,117 copies of the Notice Packet to potential Class Members and nominees. *See id*. ¶ 7. In addition, Epiq caused the Summary Notice to be published in *The Wall Street Journal* and *Investor's Business Daily* on May 22, 2023. *See id*. ¶ 8. Copies of the Notice, Claim Form, Stipulation, Preliminary Approval Order, and Complaint were made available on the settlement website maintained by Epiq beginning on May 5, 2023. *See id.* ¶ 12.

This combination of individual mail to all Class Members who could be identified with reasonable effort, supplemented by notice in an appropriate, widely circulated publication, transmitted over the newswire, and set forth on internet websites, was "the best notice . . . practicable under the circumstances." Fed. R. Civ. P. 23(c)(2)(B); *see, e.g.*, *Frontier*, 2022 WL

4080324, at *10 (finding that similar notice program in a securities class action "satisfied the requirements of Rule 23 . . . and due process, and provided the best notice practicable under the circumstances"); *see also In re Qudian Inc. Sec. Litig.*, 2021 WL 2383550, at *3 (S.D.N.Y. June 8, 2021); *In re Blue Apron Holdings, Inc. Sec. Litig.*, 2021 WL 345790, at *4 (E.D.N.Y. Feb. 1, 2021).

CONCLUSION

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

Dated: June 26, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on June 26, 2023, a copy of the foregoing Memorandum of Law in Support of Plaintiffs' Motion for Final Approval of Settlement and Plan of Allocation was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the Court's CM/ECF System.

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