UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MARVIN PEARLSTEIN, Individually and On Behalf of All Others Similarly Situated, Plaintiff, vs. BLACKBERRY LIMITED (formerly known as RESEARCH IN MOTION LIMITED), THORSTEN HEINS, BRIAN BIDULKA, and STEVE ZIPPERSTEIN, Defendants.	)	**Case No. 1:13-CV-7060-CM-KHP**

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR PRELIMINARY APPROVAL OF SETTLEMENT

TABLE OF CONTENTS

Page:

TABLE OF AUTHORITIES

Page(s):

Cases

Other Authorities

Rules

Class Representatives and Lead Plaintiffs Todd Cox and Mary Dinzik ("Plaintiffs"), individually and on behalf of the Class, respectfully submit this memorandum in support of their motion seeking: (i) preliminary approval of the proposed Settlement set forth in the Stipulation and Agreement of Settlement effective June 7, 2022 (the "Stipulation," filed herewith);[1] (ii) approval of the form and manner of giving notice to Class Members of the proposed Settlement; and (iii) the setting of a fairness hearing (the "Settlement Hearing")[2] and deadlines for dissemination of Notice, for Class Member objections and exclusion, for the filing of Plaintiffs' motion for Final Approval of the Settlement, and for the filing of Plaintiffs' Counsel's application for an award of attorneys' fees and reimbursement of expenses and compensatory awards to Plaintiffs.

I. PRELIMINARY STATEMENT

On the eve of trial, after litigating this Action for nearly nine years, Plaintiffs negotiated a Settlement which provides an immediate, excellent recovery to the Class, particularly when viewed against the risks of continuing litigation and the available sources of recovery. The proposed Settlement will resolve all claims in exchange for a cash payment of $165,000,000 (the

[1] The Settling Parties to the Stipulation are Plaintiffs and Defendant Blackberry Limited ("BlackBerry" or the "Company"). The Individual Defendants are not Settling Parties but are subject to a separate agreement with Plaintiffs that, together with the Stipulation, provides for the dismissal and release of all claims upon the Effective Date of the Settlement, as defined in the Stipulation at ¶ 7.1. This agreement is available to the Court for *in camera* review upon request. All capitalized terms not defined herein have the meanings ascribed to them in the accompanying Stipulation.

[2] Pursuant to the Court's Individual Rule V.F.6., Plaintiffs met and conferred with Defendants regarding potential conflicts prior to requesting a placeholder date for the Settlement Hearing from the Court's clerk. After the Parties received a placeholder date, Defendants advised Plaintiffs that the date was not workable for Defense counsel due to the Jewish holidays and related travel. To avoid delay in the execution of the Stipulation, Plaintiffs and Defendants agreed to push back the placeholder date by one day, to September 29, 2022, subject to the Court's availability. In the event that the 29th is not an acceptable date for the Court, Plaintiffs have no conflicts through the end of October. Defense counsel are available throughout September and October except on: September 1-12, 26-28; October 4-6 and 21-24.

"Settlement Amount") for the benefit of the Class. Plaintiffs believe the Settlement Amount represents a significant portion of recoverable damages given the uncertainties of trial, inevitable post-trial appeals, and BlackBerry's limited assets and lack of insurance covering the claims.

At this late stage of the litigation, Plaintiffs are well-situated to evaluate the risks and benefits of settlement. Even though the case was initially dismissed, Plaintiffs successfully appealed to the Second Circuit, vacating the dismissal and reviving the case. Thereafter, Plaintiffs drafted an amended complaint which survived Defendants' second motion to dismiss, navigated a lengthy and extensive discovery process, certified the Class, defeated Defendants' motion for summary judgment and a reconsideration motion, submitted and defended against a collective 39 motions *in limine*, and prepared for the imminent trial (including drafting and amending lengthy witness, exhibit, and deposition designation lists, preparing three expert witnesses and two Lead Plaintiffs to testify, conducting a two day mock trial in New York involving dozens of New York City residents acting as jurors, and attending the Final Pre-Trial Conference). Plaintiffs believed in their chances of success at trial; however, securities cases are complex, and the amount of damages awarded by the jury could be substantially less than the maximum recoverable damages calculated by Plaintiffs' expert. Additionally, even if Plaintiffs were to succeed at trial, collectability of a large jury award against BlackBerry could not be assured. Not to mention, the appeals process could continue for years, further prolonging the time before the Class Members could receive a recovery.

The Settlement provides a substantial, immediate, and guaranteed recovery for Class Members. Plaintiffs and Plaintiffs' Counsel believe that the proposed Settlement is fair, reasonable, adequate, and in the Class Members' best interest. Moreover, the proposed content and manner of providing notice satisfies requirements imposed by Fed. R. Civ. P. 23, the Private

Securities Litigation Reform Act of 1995 ("PSLRA"), and due process. For these reasons, the Court should preliminarily approve the Settlement.

II. SUMMARY OF THE LITIGATION AND SETTLEMENT

A. Nature of the Case

This is a class action litigation on behalf of all those who purchased or otherwise acquired BlackBerry common stock on the NASDAQ between March 28, 2013 and September 20, 2013 (the "Class Period"), against BlackBerry, its former Chief Executive Officer Thorsten Heins, its former Chief Financial Officer Brian Bidulka, and its former Chief Legal Officer Steve Zipperstein for violations of the Securities Exchange Act of 1934 (the "Exchange Act"). *See* Second Amended Complaint (the "Complaint"), ECF No. 84 at ¶ 1; Order Granting Class Certification, ECF No. 488 at 2.

Plaintiffs allege that Defendants violated Sections 10(b) and 20(a) of the Exchange Act by making false and misleading statements and omissions concerning the success (or lack thereof) of BlackBerry's new line of BlackBerry 10 ("BB10") smartphones, despite the fact that the phones were not selling well, lacked many of the popular apps available on competitors' phones, and were being returned by dissatisfied consumers at a very high rate. *See* Plaintiff's Factual Contentions, ECF No. 599-1 at ¶¶ 5, 10-12, 33-34, 46, 50. Plaintiffs further allege that Defendants obscured the truth about BB10 sales by improperly recognizing revenue using the "sell-in" method of accounting (recognizing revenue at the time the devices were shipped to carriers and distributors) rather than the "sell-through" method (recognizing revenue when devices were sold to end users). *See id.* at ¶¶ 40, 78. Plaintiffs allege that, as a result of these statements and omissions, the price of BlackBerry's common stock was artificially inflated and that Plaintiffs and Class Members were damaged when the truth was revealed and the price of BlackBerry's stock crashed. *See* Complaint at ¶¶ 58, 66-67, 189-190.

B. Procedural History

1. The Complaint, Motion to Dismiss, and Successful Appeal to the Second Circuit

As the Court is well aware, this case has an unusually long and complex procedural history. The initial complaint was filed on October 4, 2013, shortly followed by two related complaints. On March 24, 2014, the Court consolidated the three cases, appointed Todd Cox and Mary Dinzik as Lead Plaintiffs, and appointed Kahn Swick & Foti, LLC ("KSF") as Lead Counsel. *See* ECF No. 36 at 2. After conducting an extensive investigation into the underlying claims, Plaintiffs filed their First Amended Complaint ("FAC") on June 2, 2014. *See* ECF No. 42. On July 29, 2014, Defendants moved to dismiss the FAC. *See* ECF No. 44.

On March 13, 2015, the late Hon. Thomas P. Griesa granted Defendants' motion to dismiss the FAC. *See Pearlstein v. BlackBerry Ltd.*, 93 F. Supp. 3d 233 (S.D.N.Y. 2015); ECF No. 54. On March 31, 2015, Plaintiffs moved for reconsideration based on the Supreme Court's decision in *Omnicare, Inc. v. Laborers District Council Construction Industry Pension Fund*, 575 U.S. 175 (2015). *See* ECF No. 56. This motion for reconsideration was denied. *See* ECF No. 62. Plaintiffs then appealed to the Second Circuit, which vacated in part and remanded for reconsideration of whether Plaintiffs should be granted leave to amend the complaint. *See Cox v. Blackberry Limited*, 660 Fed. App'x 23 (2d Cir. 2016). After further briefing, Judge Griesa allowed Plaintiffs to file the Second Amended Complaint on September 29, 2017, which Defendants once again moved to dismiss. *See* ECF No. 84; ECF Nos. 96-102. After Judge Griesa's passing, the case was reassigned on December 13, 2017. On March 19, 2018, this Court denied Defendants' motion to dismiss the Complaint in full. *See* ECF No. 115.

2. Fact and Expert Discovery

The Parties then conducted extensive discovery. Plaintiffs reviewed over 305,000 documents produced by Defendants, as well as documents obtained or subpoenaed from numerous

third parties, including BlackBerry's auditors and multiple carriers and retailers of the BB10 devices, which documents totaled approximately ***12 million pages***. Plaintiffs took 28 fact witness depositions and defended the depositions of the two Lead Plaintiffs, completing the fact depositions just as the country began shutting down due to the COVID-19 pandemic. Further, because most witnesses were located abroad (including a majority in Canada where BlackBerry is headquartered), Plaintiffs needed to enter into discovery agreements with Defendants and third parties to obtain documents and testimony.

At the class certification stage, the Parties proffered competing experts on market efficiency and price impact. For trial, Plaintiffs proffered expert witnesses in market efficiency and damages, marketing, and accounting, all of whom prepared multiple expert reports and were deposed. Defendants proffered five expert witnesses of their own, three of whom were deposed. After the conclusion of expert discovery both sides moved to exclude the testimony of two of the other Party's expert witnesses in accordance with *Daubert v. Merrell Dow Pharmaceuticals, Inc*., 509 U.S. 579 (1993). On September 10, 2021, the Court issued an order granting in part and denying in part these motions. *See* ECF No. 567.

3. Class Certification

On May 11, 2018, Plaintiffs filed a motion for class certification, appointment of class representatives, and appointment of class counsel. *See* ECF No. 129. Before resolution, however, this Action was placed on the Court's Suspense Calendar pending the Second Circuit's decision in *In re Goldman Sachs Group Inc. Sec. Litig*. and the Court administratively closed Plaintiffs' motion, directing Plaintiffs to re-file their moving papers after the Second Circuit issued its opinion. *See* ECF Nos. 247, 252, 304. The Court removed the case from the Suspense Calendar on May 29, 2020 and Plaintiffs filed a renewed motion for class certification on June 8, 2020. *See* ECF Nos. 459, 463. The Court granted this motion on January 26, 2021, certifying a Class of "all

those who purchased or otherwise acquired the common stock of BlackBerry Limited on the NASDAQ during the period from March 28, 2013 through and including September 20, 2013" excluding "any person who purchased BlackBerry from March 28, through April 10, 2013 and who sold all of their position prior to April 11, 2013," as well as "Defendants, officers, and directors of BlackBerry Limited, members of their immediate families and their legal representatives, heirs, successors, or assigns, and any entity in which Defendants have or had a controlling interest." ECF No. 488 at 44, 2.

Subsequently, Plaintiffs solicited competitive bids for a class administrator and moved for approval of a notice of pendency of class action, which was granted. *See* ECF Nos. 563-565, 569. The Claims Administrator, JND Legal Administration, published the notice over *PR Newswire*, mailed copies of a postcard notice to potential class members, set up a claims call center, and established a class website. *See* ECF No. 572-1.

4. First Attempt at Mediation

On May 6, 2021, the Parties engaged in a mediation with the Hon. Layn R. Phillips (Ret.). At Judge Phillip's request, the Parties submitted several additional letters over the following months, debating the strengths and weaknesses of the case. These settlement discussions were unsuccessful.

5. Summary Judgment

Defendants moved for summary judgment April 19, 2021 (ECF No. 506) and Plaintiffs submitted their opposition on June 21, 2021, along with responses to Defendants' 259-paragraph Rule 56.1 statement. *See* ECF Nos. 506, 545, 546. Defendants moved to strike Plaintiffs' responses to their 56.1 statement, to which Plaintiffs responded. *See* ECF No. 557, 561. On January 3, 2022, the Court denied Defendants' motion for summary judgment in substantial part and denied Defendants' motion to strike. *See* ECF No. 573. Defendant Zipperstein moved for reconsideration,

arguing that there was insufficient evidence to prove scienter as to his April 12, 2013 statement. *See* ECF Nos. 574, 575. The Court denied Mr. Zipperstein's motion. *See* ECF No. 576.

6. Pre-Trial Proceedings

On February 2, 2022, the Court issued a Ready for Trial Order stating that trial would be set for early April. *See* ECF No. 577. In accordance with this Order, the Parties submitted a Proposed Pre-Trial Order on February 25, 2022 with accompanying exhibit, witness, and deposition designation lists. *See* ECF No. 599. In an attempt to compromise and put forward only the most essential evidence for trial, the Parties met and conferred at length, after which time all Parties made substantial edits to their respective lists. *See* ECF No. 680, 791. Plaintiffs briefed 10 motions *in limine* (8 of which were granted in full or in part, one of which was withdrawn, and one denied), opposed 22 of Defendants' 29 motions *in limine* (18 of which were denied or denied as moot). *See* ECF No. 790. Plaintiffs also began preparing for trial, including crafting and testing opening and closing statements, preparing outlines to examine and cross examine witnesses, meeting in-person and via video conference with Lead Plaintiffs and expert witnesses in preparation for their testimony, working with a graphics company to prepare exhibits for trial, and conducting a two-day mock trial using New York residents as mock jurors.

Defendant Zipperstein moved for judgment on the pleadings based on a statute of limitations argument (ECF No. 797) which Plaintiffs opposed. *See* ECF No. 799. The Court denied Defendant Zipperstein's motion on April 4, 2022. *See* ECF No. 809.

On March 3, 2022, the Court issued an order setting the dates for the Final Pre-Trial Conference and the trial (ECF No. 604) and on March 9, 2022, the Court issued a Memorandum providing, *inter alia*, an agenda for the Final Pre-trial Conference. *See* ECF No. 724. The Memorandum also communicated that the Court's Senior Law Clerk, Jim O'Neill, would be available to facilitate settlement discussions. Prior to the conference, Mr. O'Neill contacted both

sides to assess their openness to the possibility of settlement.

On Monday, March 14, 2022, the Court conducted an in-person Final Pre-Trial Conference with the Parties. Shortly thereafter, the Parties agreed to engage in renewed settlement discussions with Judge Phillips.

C. The Settlement

This Settlement was achieved literally on the eve of trial after many rounds of informal negotiations with a highly regarded mediator, Judge Phillips, as well as the assistance of Mr. O'Neill, the Court's Senior Law Clerk. Plaintiffs were fully prepared to try the case and previous attempts at negotiating a settlement, including a mediation session with Judge Phillips in May 2021, had been unsuccessful. While intensive trial preparations were underway, however, the Parties continued to negotiate through Judge Phillips.

Initially, the numbers proposed by the Parties were very far apart and negotiations broke down. A few days later, Mr. O'Neill successfully encouraged the Parties to recommence discussions and redouble their efforts. On April 5, 2022, Judge Phillips made a mediator's proposal to settle the Action for the Settlement Amount, which both sides accepted on April 6, 2022 – the afternoon before *voir dire* was set to commence. Plaintiffs' Counsel continued to vigorously advocate for Plaintiffs and the Class as they worked with Defendants to negotiate the full settlement terms. Under those terms, BlackBerry will pay $165,000,000 into an interest-bearing escrow account following preliminary approval of the Settlement. *See* Stipulation at ¶¶ 1.46, 2.2. Upon final approval, the Net Settlement Fund (*i.e.*, the Settlement Amount, plus interest, minus fees, costs, and expenses approved by the Court) will be distributed to Class Members who submit valid Claim Forms ("Authorized Claimants"), in accordance with a plan of allocation to be approved by the Court (discussed below).

After nearly nine years of litigation, including an in-depth review of the merits of the case

in preparation for trial, Plaintiffs and Plaintiffs' Counsel were well-positioned to evaluate the Settlement, as well as the potential risks and benefits of continuing to trial and possible future appeals. Based on this evaluation, Plaintiffs and Plaintiffs' Counsel agree that the Settlement represents a fair, adequate, and reasonable result for the Class. While Plaintiffs believe that the merits of their case are strong, even if Plaintiffs ultimately prevailed at trial, post-trial appeals were inevitable given the procedural history of this Action. Post-trial proceedings can take years, further prolonging the time before Class Members could receive compensation, and there is always a possibility that a successful verdict at trial could be overturned on appeal. Given these and other significant risks detailed below, Plaintiffs and Plaintiffs' Counsel believe that the guaranteed, prompt recovery provided by the Settlement is in the best interest of the Class.

III. THE SETTLEMENT SHOULD BE PRELIMINARILY APPROVED

The Second Circuit recognizes the "strong judicial policy in favor of settlements, particularly in the class action context." *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 116 (2d Cir. 2005). Courts should approve a class action settlement if it is "fair, reasonable, and adequate." FED. R. CIV. P. 23(e)(2); *see also In re Signet Jewelers Ltd. Sec. Litig.*, No. 16-cv-06728, 2020 U.S. Dist. LEXIS 128998, at *4 (S.D.N.Y. July 21, 2020) (McMahon, J.).

"Review of a proposed class action settlement generally involves a two-step process: preliminary approval and a subsequent 'fairness hearing.'" *In re Initial Pub. Offering Sec. Litig.*, 243 F.R.D. 79, 87 (S.D.N.Y. 2007), *adhered to on reconsideration*, No. 01-cv-3020, 2007 U.S. Dist. LEXIS 23174, at *9 (S.D.N.Y. Mar. 20, 2007). "In considering preliminary approval, courts make a preliminary evaluation of the fairness of the settlement, prior to notice" and "[o]nce preliminary approval is bestowed, the second step of the process ensues: notice is given to the class members of a hearing, at which time class members and the settling parties may be heard with respect to final court approval." *In re Nasdaq Mkt.-Makers Antitrust Litig.*, 176 F.R.D. 99, 102

(S.D.N.Y. 1997) (internal citation omitted). "Preliminary approval of a settlement agreement requires only an 'initial evaluation' of the fairness of the proposed settlement on the basis of written submissions and an informal presentation by the settling parties." *Tiro v. Pub. House Invs., LLC*, No. 11-cv-7679, 2013 U.S. Dist. LEXIS 72826, at *6 (S.D.N.Y. May 22, 2013) (McMahon, J.) (citing *Clark v. Ecolab, Inc.*, Nos. 07-cv-8623 et al., 2009 U.S. Dist. LEXIS 108736, at *14 (S.D.N.Y. Nov. 27, 2009)). "[C]ourts should give proper deference to the private consensual decision of the parties," and consider "the unique ability of class and defense counsel to assess the potential risks and rewards of litigation." *Waterford Twp. Police & Fire Ret. Sys. v. Smithtown Bancorp, Inc.*, No. 10-cv-0864, 2015 U.S. Dist. LEXIS 73276, at *18 (E.D.N.Y. Apr. 17, 2015).

Rule 23(e)(1) provides that preliminary approval should be granted where "the parties show[] that the Court will likely be able to: (i) approve the proposal under Rule 23(e)(2); and (ii) certify the class for purposes of judgment on the proposal." FED. R. CIV. P. 23(e)(1). As set forth below, this Settlement satisfies both prongs. It also meets the criteria for final approval articulated in *Detroit v. Grinnell Corp.*, 495 F.2d 448 (2d Cir. 1974).

A. The Settlement Satisfies the Factors for Final Approval under Rule 23(e)(2) and *Grinnell*

The Settlement is highly beneficial to the Class and satisfies the factors articulated in the recent amendments to Rule 23(e)(2) and *Grinnell*. Under the recent amendments to Rule 23(e)(2), courts assessing approval are to consider 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 attorneys' 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). Historically, courts in the Second Circuit have also considered the following factors set forth in *Grinnell* in evaluating a class-action settlement:

> (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 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.

In re Signet Jewelers, 2020 U.S. Dist. LEXIS 128998 at *5 (citing *Grinnell*, 495 F.2d at 463). "The factors set forth in Rule 23(e)(2) have been applied in tandem with the Second Circuit's *Grinnell* factors and 'focus the court and the lawyers on the core concerns of procedure and substance that should guide the decision whether to approve the proposal.'" *In re Namenda Direct Purchaser Antitrust Litig.*, 462 F. Supp. 3d 307, 311 (S.D.N.Y. 2020) (McMahon, J.) (citation omitted).

However, the court should not "engage in a complete analysis at the preliminary approval stage…as other courts in this Circuit have held, 'it is not necessary to exhaustively consider the factors applicable to final approval'" when considering preliminary approval. *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 330 F.R.D. 11, 30 n.24 (E.D.N.Y. 2019) (quoting *In re Platinum & Palladium Commodities Litig.*, No. 10-cv-3617, 2014 U.S. Dist. LEXIS 96457, at *38 (S.D.N.Y. July 15, 2014)). Indeed, certain factors -- such as the reaction of the class to the settlement -- will not have sufficient data to thoroughly consider until the final approval stage. *Id.*

1. The Class was Well-Represented by Class Representatives and their Counsel

Class Representatives and Plaintiffs' Counsel more than satisfy Rule 23(e)(2)(A)'s "adequate representation" requirement. That requirement focuses mainly on the "alignment of interests between class members." *See Wal-Mart Stores, Inc.*, 396 F.3d at 106-07. Here, Class

Representatives' interests were aligned at all times with the interests of absent Class Members. All bring the exact same claims asserting the same legal theory over the same Class Period. Because Class Representatives and counsel all "share the common goal of maximizing recovery, there is no conflict of interest[.]" *See In re Polaroid ERISA Litig.*, 240 F.R.D. 65, 77 (S.D.N.Y. 2006). Class Representatives have significantly contributed to the Action by overseeing the litigation and supervising Plaintiffs' Counsel. Mr. Cox and Ms. Dinzik each reviewed the amended complaints and other filings, participated in discovery, were deposed, participated in settlement discussions with Plaintiffs' Counsel, spent hours preparing multiple times in person to testify at trial, and travelled to New York in anticipation of taking the stand at trial.

As detailed above, Plaintiffs' Counsel resurrected this case from dismissal and advanced it to the courthouse steps, a place few securities class actions ever reach. Accordingly, Plaintiffs' Counsel's settlement posture was informed by, among other things, the preparation of multiple amended complaints, a successful appeal of dismissal and substantive motion to amend; extensive class briefing, including a 23(f) petition, and discovery; fact discovery that included approximately 12 million pages of documents and 28 depositions; defeating a motion for summary judgment in substantial part, a reconsideration motion, and a pre-trial motion for judgment on the pleadings; briefing 39 *in limine* motions; and finalizing preparations for trial, including opening and closing statements, witness preparation, deposition designations, trial exhibits. Based on this nearly nine-year litigation history, Plaintiffs' Counsel -- who have extensive experience litigating securities class actions -- put themselves and the Class in the best "position to realistically evaluate the strengths and weaknesses of the claims, and to evaluate the fairness of the proposed Settlement." *In re Marsh & McLennan Cos., Inc. Sec. Litig.*, No. 04-cv-8144, 2009 WL 5178546, at *6 (S.D.N.Y. Dec. 23, 2009) (McMahon, J.). This Court has previously found that the stage of the

proceedings favors approval when, as here, a case is "on the eve of trial" and "all fact and expert discovery was completed." *Namenda*, 462 F. Supp. 3d at 312; *see also In re Veeco Instruments*, 2007 U.S. Dist. LEXIS 85629, at *23 ("This case was litigated to the very eve of trial, after completion of merits and expert discovery.").

Believing the $165 million settlement to be in the best interests of the Class, and after discussing with Class Representatives, Plaintiffs' Counsel accepted this recommendation.

2. The Settlement Is the Result of Good Faith, Arm's Length Negotiations

Courts apply a "presumption of fairness" where a "class settlement is reached in arm's length negotiations between experienced, capable counsel after meaningful discovery." *Belton v. Ge Capital Consumer Lending*, No. 21-cv-9492, 2022 U.S. Dist. LEXIS 24423, at *8 (S.D.N.Y. Feb. 10, 2022) (McMahon, J.) (citation omitted); *see also* FED. R. CIV. P. 23(e)(2)(B). In such circumstances, "[t]he judgment of Lead Counsel…is entitled to 'great weight.'" *In re Signet Jewelers*, 2020 U.S. Dist. LEXIS 128998 at *10 (citation omitted). Additionally, a "mediator's involvement in pre-certification settlement negotiations helps to ensure that the proceedings were free of collusion and undue pressure." *D'Amato v. Deutsche Bank*, 236 F.3d 78, 85 (2d Cir. 2001).

Here, the Settling Parties reached an agreement to settle only after discovery concluded, dispositive and pretrial motions defined the contours of the case for trial, and numerous discussions (including an exchange of mediation statements and follow-up submissions on liability, the scope of the Class, and damages) over the course of a year with a highly regarded and experienced mediator culminated in a mediator's recommendation. This Court has previously approved similar settlements that were the result of a mediator's recommendation by Judge Phillips. *See In re Signet Jewelers*, 2020 U.S. Dist. LEXIS 128998 at *8 (citing *In re Bear Stearns Cos., Inc. Sec. Derivative & ERISA Litig.*, 909 F. Supp. 2d 259, 265 (S.D.N.Y. 2012) (settlement fair where the parties

engaged in "arm's length negotiations," with "retired federal judge Layn R. Phillips, an experienced and well-regarded mediator of complex securities cases")).

3. The Settlement is an Excellent Result for the Class

The Settlement provides a substantial and immediate recovery for the Class, and is fair, reasonable, and adequate considering "the costs, risks, and delay of trial and appeal" and other relevant factors. FED. R. CIV. P. 23(e)(2)(C). The Settlement must be judged "not in comparison with the possible recovery in the best of all possible worlds, but rather in light of the strengths and weaknesses of plaintiffs' case." *Guevoura Fund Ltd. v. Sillerman*, No. 15-cv-07192, 2019 U.S. Dist. LEXIS 218116, at *28 (S.D.N.Y. Dec. 18, 2019) (McMahon, J.) (citing *In re IMAX Sec. Litig.*, 283 F.R.D. 178, 191 (S.D.N.Y. 2012)).

Here, the Settlement provides a cash payment of $165 million (U.S.) for the benefit of the Class. This is an excellent result, especially given the significant risks of continued litigation and the possibility that a substantially higher verdict, even if awarded at trial and sustained on appeal, could not actually be collected. After consulting with an econometric expert, Plaintiffs and Plaintiffs' Counsel believe that a successful verdict on all claims could result in aggregated damages to the Class as high as $1.2 billion. However, Defendants' competing damages expert argues that the Class did not suffer any damages caused by the alleged misrepresentations and omissions, or in the alternate, damages were *de minimis*. Even if Plaintiffs prevailed on the facts at trial, this "battle of the experts" may convince a jury that factors other than the alleged fraud caused the decline in stock price on each disclosure date, and thus, the actual damages awarded could be significantly lower than Plaintiffs' estimate. *See In re Signet Jewelers*, 2020 U.S. Dist. LEXIS 128998, at *33 (approving a settlement where disputed issues regarding damages could have led to a "battle of the experts," noting "[t]here is no way to predict with any certainty which expert's opinions the jury would have accepted"). Further, if maximum damages were awarded,

there is a real risk of collectability due to Defendants' lack of insurance and liquid assets.

Even without discounting these risks, the Settlement in this Action is highly favorable compared to other securities fraud class action settlements. Plaintiffs estimate that this recovery represents approximately 13.7% of the $1.2 billion maximum damages had they prevailed at trial, a figure that falls well within this Court's previously accepted range in similar cases. *See In re Signet Jewelers*, 2020 U.S. Dist. LEXIS 128998, at *36 (approving a settlement of "almost 14% of maximum potential damages"); *Christine Asia Co.*, 2019 U.S. Dist. LEXIS 179836, at *52 (approving a settlement of approximately 17% of maximum damages) (citing *In re Merrill Lynch & Co., Inc. Research Reports Sec. Litig.*, No. 02-MDL-1484, 2007 U.S. Dist. LEXIS 9450, at *33 (S.D.N.Y. Feb. 1, 2007) (recovery of approximately 6.25% was "at the higher end of the range of reasonableness of recovery in class action[] securities litigations")); *City of Providence v. Aéropostale, Inc.*, No. 11-cv-7132, 2014 U.S. Dist. LEXIS 64517, at *27 (S.D.N.Y. May 9, 2014) (McMahon, J.), *aff'd sub nom. Arbuthnot v. Pierson*, 607 F. App'x 73 (2d Cir. 2015) (approving settlement of approximately 9.2% of the maximum estimated damages).

Furthermore, settlements of this size are rare achievements – according to Cornerstone Research, there were only three securities class action cases in 2021 that settled for over $100 million. *See* CORNERSTONE RESEARCH, *Securities Class Action Settlements: 2021 Review and Analysis* at 3, available at https://www.cornerstone.com/wp-content/uploads/2022/03/Securities-Class-Action-Settlements-2021-Review-and-Analysis.pdf.

a. The costs, risks and delay of trial and appeal support approval

A $165 million settlement is a strong result for the Class in and of itself, but when weighed against the risks of continued litigation, the Settlement is an outstanding recovery. Plaintiffs successfully prosecuted this case through the summary judgment stage, but there can be no

assurance that, at trial, a jury would find that Defendants made misrepresentations, that those misrepresentations were the cause of investor losses, or that Defendants acted with scienter – an especially difficult element to prove. *See Christine Asia Co.*, 2019 U.S. Dist. LEXIS 179836, at *46 ("[p]roving scienter is hard to do") (citing *Kalnit v. Eichler*, 99 F. Supp. 2d 327, 345 (S.D.N.Y. 2000) ("The element of scienter is often the most difficult and controversial aspect of a securities fraud claim.")).

While Plaintiffs believe that the merits of their case are strong, Defendants contend that they did not violate the federal securities laws, did not act with scienter, and did not cause damages to the Class. Among other things, Defendants would likely argue that BlackBerry was a particularly risky stock to invest in during the Class Period, that the success of the BB10s was far from certain, and that those risks were disclosed by the Company and known to investors at the time. Defendants would also lean into the fact that BlackBerry's independent auditor, Ernst & Young, thoroughly vetted and signed off on the Company's Class Period financial statements, which were never restated. Defendants would also argue that the Individual Defendants had no motive to defraud, and that Plaintiffs made no attempt to allege insider trading conduct. While Plaintiffs believe they have strong responsive arguments, any or all of these arguments could be persuasive to a jury and affect liability and damages.

Additionally, the continuing uncertainties due to COVID-19 present a risk to the availability of witnesses and jurors, and potentially completing the trial at all.

Importantly, prevailing at trial would not necessarily result in a larger recovery. The jury could award a smaller amount of damages, or the verdict could be appealed and possibly overturned. *See, e.g.*, *Robbins v. Koger Properties, Inc.*, 116 F.3d 1441 (11th Cir. 1997) (reversing jury verdict of $81 million for plaintiffs against an accounting firm and entering judgment for

defendant); *Anixter v. Home-Stake Prod. Co.*, 77 F.3d 1215 (10th Cir. 1996) (overturning securities fraud class action jury verdict for plaintiffs in a case tried in 1988 on the basis of a Supreme Court opinion handed down in 1994). Post-trial proceedings can take years, further prolonging the time before Class Members could receive compensation. *See, e.g.*, Class Pls.' Mem. of Law in Supp. of Mot. for Approval of Settlement for Reliance Claimants and for Reimbursement of Additional Expenses, *In re Vivendi Universal, S.A. Sec. Litig.*, No. 02-cv-5571 (S.D.N.Y. Apr. 21, 2017), ECF No. 1313 (motion for preliminary approval filed after appeal and approximately 7.5 years after the jury verdict); *see also* Mem. of P. & A. in Supp. of Pls' Unopposed Mot. for Prelim. Approval of Class Action Settlement, *Lawrence E. Jaffe Pension Plan v. Household Int'l, Inc.*, No. 02-cv-5893 (N.D. Ill. Jun. 20, 2016), ECF No. 2212 (motion for preliminary approval filed approximately 7 years after the jury verdict and after appeal, which reversed the verdict in part and ordered a limited new trial).

Finally, as mentioned above, the $1.2 billion total damages estimate is not an accurate benchmark to assess the reasonableness of the proposed Settlement given BlackBerry's financial condition and lack of insurance. BlackBerry is not the same company it was a decade ago. Even if the jury ruled in Plaintiffs' favor across the board on liability and adopted Plaintiffs' damages model in full, and the claims rate for the Class was at or near 100% such that Plaintiffs actually *did* obtain a $1.2 billion judgment, there is no evidence BlackBerry could have satisfied it. The claims at issue in this case are not covered by an insurance policy, and an award of the maximum damages could seriously deplete BlackBerry's assets. *See In re Signet Jewelers*, 2020 U.S. Dist. LEXIS 128998, *35 (approving a settlement where, if plaintiffs had been awarded maximum damages, there was "a serious risk that the Company would be unable to fund the judgment and, perhaps, be forced into bankruptcy"). The mere passage of time, given Blackberry's current

business, financial condition, and cash burn, threatens Plaintiffs' ability to potentially collect anything on a judgment in an unknown future. Indeed, on June 1, 2022, BlackBerry announced that its anticipated $600 million patent sale to Catapult IP Innovations Inc. "is no longer under exclusivity…and, given the length of time that the transaction has taken, BlackBerry is exploring alternative options in parallel." Therefore, in contrast to the nine figure Settlement Amount now before the Court, after many more years of litigation (through trial, claims processing, and appeals), the Class could receive nothing. *See, e.g.*, *Teachers' Ret. Sys. v. A.C.L.N., Ltd.*, No. 01-cv-11814, 2004 U.S. Dist. LEXIS 8608, at *11 (S.D.N.Y. May 14, 2004) ("The risks to establishing the Settling Defendants' liability were augmented by the fact that ACLN is a foreign company….").

b. Other Rule 23(e)(2)(C) factors support approval

Rule 23(e)(2)(C) also states that adequacy should be assessed 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). Each of these factors supports approval.

First, the Settlement calls for an experienced Claims Administrator to process claims and distribute the Net Settlement Fund *pro rata* to the Class Members according to the defined Plan of Allocation (as described in the exhibits to the accompanying Stipulation) using procedures that are well-established and have been proven effective in other securities fraud litigations. JND Legal Administration ("JND"), the Claims Administrator selected by Lead Counsel after a competitive bidding process (subject to Court approval), will process claims under the guidance of Lead Counsel and provide the Class Members with a reasonable opportunity to cure deficiencies in their claims. Thereafter, JND will audit the claims received and evaluate the proposed distribution

according to the Plan of Allocation. Lead Counsel will then move the Court for an order of distribution permitting checks to be mailed to Authorized Claimants.

Second, as disclosed in the Notice, Lead Counsel, who have not been paid to-date, will apply for a fee award not to exceed one-third of the Settlement Amount. This amount – particularly given the attendant risks and late state of the litigation, which has spanned nearly nine years and included a successful appeal – would be consistent with awards in similar complex class action cases. *See, e.g.*, *Guevoura Fund*, 2019 U.S. Dist. LEXIS 218116 at *64 ("the 33 1/3% fee requested by Lead Counsel in this Action is consistent with percentage fees awarded in this Circuit and nationwide for comparable recoveries"); *Vista Healthplan, Inc. v. Cephalon, Inc.*, No. 06-cv-1833, 2020 U.S. Dist. LEXIS 69614, at *82 (E.D. Pa. Apr. 20, 2020) (for a case also settled on the eve of trial, "33 1/3% of the total recovery" was "well within the range of reasonable fees"); *In re BioScrip, Inc. Sec. Litig.*, 273 F. Supp. 3d 474, 497 (S.D.N.Y. 2017), *aff'd sub nom. Fresno Cty. Employees' Ret. Ass'n v. Isaacson/Weaver Fam. Tr.*, 925 F.3d 63 (2d Cir. 2019) (approving 33 1/3% fee award and stating "courts routinely award a percentage amounting to approximately 1/3"). Here, the fee request follows "years of litigation….This is not a class action that was settled early on, with only minimal or preliminary discovery. The case involved a substantial expenditure of time and effort by Lead Counsel." *City of Providence*, 2014 U.S. Dist. LEXIS 64517 at *30 (awarding 33% of the settlement fund), *aff'd sub nom. Arbuthnot*, 607 F. App'x 73 (collecting cases, awarding 33% of the settlement fund).

4. The Settlement Treats All Class Members Equitably

The Settlement easily satisfies the Rule 23(e)(2)(D) criteria that the settlement treat class members equitably relative to one another. Under the proposed Plan of Allocation, each Authorized Claimant will receive a *pro rata* share of the Net Settlement Fund, which shall be determined by the formula of the Authorized Claimant's Recognized Loss divided by the total

Recognized Losses of all Authorized Claimants, multiplied by the total amount in the Net Settlement Fund. Courts have repeatedly approved similar plans. *See, e.g.*, *In re Citigroup, Inc. Sec. Litig.*, 965 F. Supp. 2d 369, 386-87 (S.D.N.Y. 2013); *In re Marsh ERISA Litig.*, 265 F.R.D. 128, 145-46 (S.D.N.Y. 2010). As this Court has previously found, "an allocation formula need only have a reasonable and rational basis, particularly if recommended by experienced and competent class counsel." *In re Veeco Instruments Sec. Litig.*, No. 05-MDL-01695, 2007 U.S. Dist. LEXIS 85629, at *39 (S.D.N.Y. Nov. 7, 2007) (McMahon, J.).

B. The Remaining *Grinnell* Factors Support Approval

The additional factors articulated in *Grinnell* include the stage of the proceedings and the amount of discovery completed, the ability of the defendants to withstand a greater judgment, and the range of reasonableness of the settlement fund in light of the best possible recovery and the risks of litigation.[3] However, "a court need not find that every factor militates in favor of a finding of fairness; rather, a court consider[s] the totality of these factors in light of the particular circumstances." *In re Merrill Lynch Tyco Rsch. Sec. Litig.*, 249 F.R.D. 124, 134 (S.D.N.Y. 2008) (internal quotation marks and citation omitted). Here, as detailed above, each of the *Grinnell* factors supports approval.

IV. THE PROPOSED PLAN OF ALLOCATION SHOULD BE PRELIMINARILY APPROVED

The proposed Plan of Allocation, which is detailed in the Notice to be provided to the Class Members, will govern how the Settlement proceeds will be distributed among Class Members who timely file a valid Proof of Claim. A plan of allocation, "particularly if recommended by experienced and competent class counsel," should be approved so long as it is "fair and adequate" and "ha[s] a reasonable, rational basis." *Christine Asia Co.*, 2019 U.S. Dist. LEXIS 179836 at *15.

[3] One remaining *Grinnell* factor, the reaction of the Class, cannot meaningfully be assessed until Notice is disseminated and will be addressed at a later stage.

The proposed Plan of Allocation in this case was prepared by Lead Counsel after consulting with experts, and rationally reflects the allegations and causes of action asserted in this case as well as the Court's rulings. It will result in a fair and equitable distribution of the proceeds among Class Members who submit valid claims and there is no special treatment or preference for Plaintiffs. Each will receive no more or less than his or her *pro rata* share of the Net Settlement Fund based on Recognized Losses assessed by the formula described in the Notice.

V. THE COURT SHOULD APPROVE THE PROPOSED NOTICE AND PLAN FOR DISTRIBUTING THE NOTICE

Rule 23 directs that the notice be provided "in a reasonable manner" and be "the best notice that is practicable under the circumstances." FED. R. CIV. P. 23(e)(1)(B); FED. R. CIV. P. 23(c)(2)(B); *see also Belton*, 2022 U.S. Dist. LEXIS 24423, at *15-16. Notably, the procedures now proposed by Plaintiffs for providing Notice of the Settlement are the same procedures previously approved by the Court for providing the Notice of Pendency to the Class following class certification in advance of the trial. The notice 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." *Melito v. Experian Mktg. Sols., Inc.*, 923 F.3d 85, 95 (2d Cir. 2019). To satisfy the requirements of Rule 23 and the PSLRA, the notice must also include:

> (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.

In re Signet Jewelers, 2020 U.S. Dist. LEXIS 128998, at *43.

Plaintiffs' proposed Notice satisfies these standards. *See* Stipulation at Ex. A-1. The Notice also describes the process for seeking exclusion from the Class, or for objecting to the Settlement,

Plan of Allocation, or requests for awards of fees and expenses. *Id.* Along with the Notice, Plaintiffs proposed a Summary Notice (the "Summary Notice") and a Postcard Notice (the "Postcard Notice") which provide key information and direct Class Members to a website where they can find the full Notice. *See* Stipulation at Exs. A-3, A-4.

Plaintiffs describe their proposed plan for distributing the Notice in the Proposed Order Preliminarily Approving Settlement and Providing for Notice of Pendency (the "Proposed Order"). *See* Stipulation at Ex. A. After the Class was certified, Class Members were provided with a notice of the pendency of the class action, and a website and toll-free call center was set up. *See* ECF No. 572. To provide notice of the Settlement, the Claims Administrator shall cause the Postcard Notice to be mailed or emailed to all shareholders of record, or, for shares held in street name, to the brokers that serve as their nominees. *See* Proposed Order at ¶ 7(a). In addition, the Summary Notice will be published twice on a national business newswire within 21 calendar days after the distribution of the Postcard Notice begins. *Id.* at ¶ 7(b). Settlement documents will also be posted on the website and made available by email. *Id.* at ¶¶ 7(a)-(b). Thus, the proposed Notice meets all the requirements of due process, the PSLRA, and Rule 23 of the Federal Rules of Civil Procedure.

VI. PROPOSED SCHEDULE OF SETTLEMENT EVENTS

Plaintiffs respectfully propose the following schedule for Settlement-related events. *See also* Proposed Order at ¶ 23. The specific timing of events is determined by the date on which the Settlement Hearing is scheduled. In order to allow sufficient time for the Notice to be disseminated to the potential Class Members, Plaintiffs respectfully request that the Court schedule the Settlement Hearing at the Court's convenience no earlier than 100 calendar days after entry of the Preliminary Approval Order.

EVENT:	PROPOSED DEADLINE:
Deadline for Lead Counsel to provide notice to Class Members by either: (a) emailing the Summary Notice to Class Members for whom the Claims Administrator is able to obtain email addresses; or (b) mailing the Postcard Notice, if an email address cannot be obtained, by first class mail, postage prepaid, to Class Members who can be identified with reasonable effort by Lead Counsel, through the Claims Administrator	June 21, 2022 [or **14 days** after entry of Preliminary Approval Order]
Deadline for Lead Counsel to cause the Summary Notice to be published twice in nationally distributed, business-focused newswires	June 28, 2022 [or **21 days** after entry of Preliminary Approval Order]
Deadline for Lead Counsel to file affidavit of notice of emailing, mailing, and publication	June 28, 2022 [or **21 days** after entry of Preliminary Approval Order]
Deadline for filing of papers in support of (i) the Settlement, (ii) the Plan of Allocation, (iii) the application by Lead Counsel for attorneys' fees and/or reimbursement of expenses (collectively, the "Applications")	August 29, 2022
Deadline for Class Members to submit/file: • Proof of Claim and Release Forms • Requests to be excluded from the Class • Objections to the Settlement, or any of the Applications	August 29, 2022
Deadline for filing reply to any opposition to the Applications or any response to any objection(s) filed	September 21, 2022
Deadline for Claims Administrator to submit report outlining implementation of notice and claims administration	September 21, 2022
Date of Settlement Hearing	September 29, 2022

VII. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully requests that the Court: (1) grant preliminary approval of the proposed Settlement; (2) approve the Plan of Allocation; (3) approve the proposed form and manner of notice; and (4) schedule a Settlement Hearing.

DATED: June13, 2022

Respectfully submitted,

KAHN SWICK & FOTI, LLC

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Additional Counsel for Lead Plaintiffs and Co-Class Counsel

CERTIFICATE OF SERVICE

On June 13, 2022 the foregoing document was filed through the Court's ECF system and will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF).

/s/ Kim E. Miller
Kim E. Miller