UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF ARKANSAS

ROBERT MURRAY, On Behalf of Himself and All Others Similarly Situated, Plaintiff, vs. EARTHLINK HOLDINGS CORP., et al. Defendants.	))))))))))	No. 4:18-cv-00202-JM CLASS ACTION MEMORANDUM OF LAW IN SUPPORT OF LEAD PLAINTIFF'S MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT AND APPROVAL OF PLAN OF ALLOCATION

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I. INTRODUCTION

Pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, Lead Plaintiff seeks final approval of this all-cash settlement of $85 million, payable to a class of stockholders in connection with the 2017 Merger of Windstream and EarthLink.[1] Following six years of hard-fought litigation, this complex class action was approaching a three-week jury trial set to commence in November 2023. But after two adversarial and arm's-length mediation sessions overseen by Robert A. Meyer, an experienced and respected mediator in the securities field, the parties agreed to this Settlement.

This is an outstanding recovery for the Settlement Class. It is the largest securities class action recovery ever achieved in this District, it is the second largest such recovery ever achieved in any Arkansas federal court, and its value relative to the estimated aggregate damages is many multiples above comparable securities settlements. It is also the largest securities recovery obtained in the Eighth Circuit in over five years. There should be no doubt that Lead Plaintiff obtained the highest possible class-wide recovery for these claims, relative to the acute risks of this case and its continued litigation.

At this advanced stage of litigation, the Settling Parties were certainly well informed of the strengths and weaknesses of their claims and defenses as they negotiated the Settlement. More than 30 parties and nonparties combined to produce almost 1.5 million pages of documents. Multiple Individual Defendants, Lead Plaintiff, and Defendants' economic expert were deposed. The Settling Parties briefed two rounds of motions to dismiss, a motion for class certification, a motion for partial judgment on the pleadings, and two discovery motions. Lead Plaintiff appeared and objected to a proposed release in bankruptcy proceedings. In short, Lead Plaintiff has vigorously litigated this

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[1] Unless otherwise stated or defined, all capitalized terms used herein have the meanings provided in the Stipulation of Settlement (the "Stipulation"). ECF 182. All citations and footnotes are omitted and all emphasis is added, unless otherwise indicated.

complex case for years against a group of determined and very well-capitalized Defendants, represented by experienced securities defense firms.

The Settlement readily satisfies the requirements of Rule 23(e)(2) and meets each of the Eighth Circuit's overlapping factors for final approval. The Settlement also has Lead Plaintiff's express support. Likewise, the Plan of Allocation set forth in the Notice should be approved because it treats Settlement Class Members equitably and ensures that each such member who submits a valid and timely Claim Form will receive a *pro rata* share of the monetary relief. This is also not a claims-made settlement. If the Settlement is approved, Defendants will have no reversionary interest in the $85 million Settlement Fund under any circumstance.

For the reasons set forth herein and in the accompanying Declaration of David A. Knotts in Support of Settlement Motions ("Knotts Decl."), Lead Plaintiff respectfully requests final approval of the proposed Settlement and approval of the Plan of Allocation.

II. ABBREVIATED PROCEDURAL HISTORY OF THE ACTION

To avoid repetition, Lead Plaintiff respectfully refers the Court to the accompanying Knotts Decl. for a detailed discussion of the factual background and procedural history of the Action, the extensive efforts undertaken by Lead Plaintiff and Plaintiff's Counsel during the course of the Action, and the factors bearing on the approval of the Settlement and Plan of Allocation.

III. THE SETTLEMENT WARRANTS FINAL APPROVAL

A. The Standards for Final Approval of Class Action Settlements

"The Eighth Circuit recognizes that 'strong public policy favors settlement agreements, and courts should approach them with a presumption in their favor.'" *Beaver Cnty. Emps.' Ret. Fund v. Tile Shop Holdings, Inc.*, 2017 WL 2574005, at *2 (D. Minn. June 14, 2017) (cleaned up). This policy "'is particularly strong in the class action context.'" *Id.*

Federal Rule of Civil Procedure 23(e)(2) identifies the following factors to be considered at final approval when determining that a settlement is "fair, reasonable, and adequate":

> **(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).

These factors are considered alongside, and largely overlap with, those set forth by the Eighth Circuit: "'(1) the merits of the plaintiff's case, weighed against the terms of the settlement; (2) the defendant's financial condition; (3) the complexity and expense of further litigation; and (4) the amount of opposition to the settlement.'" *Tile Shop Holdings*, 2017 WL 2574005, at *2 (quoting *In re Wireless Tel. Fed. Cost Recovery Fees Litig.*, 396 F.3d 922, 932 (8th Cir. 2005)).

B. The Settlement Satisfies the Requirements of Rule 23(e)(2)

1. Lead Plaintiff and Plaintiff's Counsel Have More than Adequately Represented the Settlement Class

The first factor under Rule 23(e)(2) concerns the adequacy of representation provided by the class representatives and class counsel. *See* Rule 23(e)(2)(A).

Lead Plaintiff, Mr. Murray, is a resident of Mountain View, Arkansas and was a holder of 10,000 EarthLink shares at the time of the Merger. ECF 121, ¶1. Mr. Murray held those shares on

the record date for the Merger, January 23, 2017, and was issued 0.818 Windstream shares in exchange for each EarthLink share he held at the close of the Merger. *Id.* Lead Plaintiff is therefore aligned with, and a member of, the Settlement Class.

Lead Plaintiff and Plaintiff's Counsel have litigated this case from inauspicious beginnings to achieve the second largest securities settlement in any Arkansas federal court and the largest in the Eighth Circuit in over five years. At its inception, no other plaintiffs' law firm sought leadership in this Action. As one court noted in an analogous situation, "[w]hen this suit got under way, no other law firm was willing to serve as lead counsel. Lack of competition . . . suggests that most members of the securities bar saw this litigation as too risky for their practices." *Silverman v. Motorola Sols., Inc.*, 739 F.3d 956, 958 (7th Cir. 2013).

Lead Plaintiff has acted vigorously to protect the class' interests. In Windstream's bankruptcy proceeding, Windstream and EarthLink attempted to secure a complete release of the claims in this Action, for no consideration to the putative class. ECF 120-1. Lead Plaintiff and Plaintiff's Counsel hired bankruptcy counsel, submitted proof of claim forms, objected to the proposed release, and secured the ability to pursue these claims following Windstream's bankruptcy proceeding for the benefit of the class. ECF 120-1, 120-2, 120-3. Without those efforts, the Settlement Class would have been left with nothing but worthless shares in a bankrupt company's stock.

Over the past six years, Lead Plaintiff and Plaintiff's Counsel defeated four motions to dismiss filed by over twenty defendants; fully briefed and argued a motion for class certification; prevailed on two fiercely-contested discovery motions; took or defended multiple depositions; obtained and processed for review nearly 1.5 million pages of documents; and fully briefed a unique pleadings motion – offensively filed by Lead Plaintiff against Defendants – that highlighted the strengths of this case and applied additional pressure on Defendants. Knotts Decl., ¶¶11-144. The

collective tenacity of Lead Plaintiff and Plaintiff's Counsel resulted in a very favorable Settlement, providing a substantial and unlikely financial benefit for the Settlement Class. Lead Plaintiff and Plaintiff's Counsel have thus adequately represented the Settlement Class under Rule 23(e)(2)(A).

The Eighth Circuit has noted that "'judges should not substitute their own judgment as to optimal settlement terms for the judgment of the litigants and their counsel.'" *Petrovic v. Amoco Oil Co.*, 200 F.3d 1140, 1148 (8th Cir. 1999). "Consistent with this principle, [courts] give[] significant consideration to the judgment of experienced counsel who conducted arms-length negotiations." *Yarrington v. Solvay Pharms., Inc.*, 2010 WL 11453553, at *7 (D. Minn. Mar. 16, 2010). Plaintiff's Counsel is led by Robbins Geller, a firm highly experienced in prosecuting complex securities class actions in this Circuit and throughout the country. *See* Declaration of David A. Knotts Filed on Behalf of Robbins Geller Rudman & Dowd LLP in Support of Application for Award of Attorneys' Fees and Expenses, Ex. F (firm resume). Local counsel, Carney Bates & Pulliam PLLC, is a highly respected and experienced Little Rock-based law firm. *See* Declaration of Randall K. Pulliam Filed on Behalf of Carney Bates & Pulliam, PLLC in Support of Application for Award of Attorneys' Fees and Expenses, Ex. C (firm resume). Bankruptcy counsel, Lowenstein Sandler LLP, is well regarded for its bankruptcy-related practice. Bringing their experience and knowledge of this case to bear, Plaintiff's Counsel are convinced that the Settlement is in the best interests of the Settlement Class.

2. The Parties Conducted Settlement Negotiations at Arm's Length and Under the Oversight of an Experienced Mediator

The second factor under Rule 23(e)(2) considers whether the Settlement was negotiated at arm's length. *See* Rule 23(e)(2)(B). Here, the parties engaged in extensive arm's-length settlement negotiations with Robert A. Meyer, an experienced mediator. In the midst of multifaceted discovery and high-stakes motion practice, the parties held two in-person mediation sessions with Mr. Meyer, on February 27, 2024, and again on April 8, 2024. Knotts Decl., ¶¶89-92. Both of these mediations

involved extensive mediation briefs. *Id.* Following another four weeks of complex arm's-length negotiations, on May 6, 2024, the parties accepted a "Mediator's Proposal" from Mr. Meyer to resolve the litigation in exchange for an $85 million payment for the benefit of the Settlement Class. *Id.*

The parties negotiated with each side being informed, through extensive motion practice and discovery, of the key issues in the case. Settlement negotiations were difficult, adversarial, and vigorously executed by both sides. Defendants are represented by sophisticated counsel at Skadden, Arps, Slate, Meagher & Flom LLP and Norton Rose Fullbright US LLP, experienced corporate defense firms. *See, e.g.*, *Phillips v. Caliber Home Loans, Inc.*, 2021 WL 3030648, at *6 (D. Minn. July 19, 2021) ("Based on the vigorous litigation of the issues, the exchange of informal discovery, and the rigorous negotiations described in Plaintiffs' submission, it appears to the Court that the Settlement was negotiated at arms' length and under circumstances demonstrating a lack of collusion.").

3. The Settlement Is Fair, Reasonable, and Adequate

Under Rule 23(e)(2)(C), in determining whether "the relief provided for the class is adequate, taking into account . . . the costs, risks, and delay of trial and appeal," courts take into consideration "'the merits of the plaintiff's case[] weighed against the terms of the settlement'" and "'the complexity and expense of further litigation.'" *In re Uponor, Inc.*, 716 F.3d 1057, 1063 (8th Cir. 2013); *In re CenturyLink Sales Pracs. & Sec. Litig.* ("*CenturyLink I*"), 2020 WL 7133805, at *6 (D. Minn. Dec. 4, 2020).

In *Tile Shop Holdings*, the court explained that a securities settlement representing "a recovery of approximately 6.8% to 9.5%" of class-wide damages "*strongly* supports the Settlement's approval." 2017 WL 2574005, at *2-*3. Here, the Settlement represents an exceptional *22%* of the estimated aggregate recoverable damages, an amount many times greater than both *Tile Shop*

Holdings and the 4.6% median percentage recovery for securities cases in the Eighth Circuit from 2014 to 2023. Knotts Decl., ¶115. Moreover, the Settlement is over *five times* the median value of securities class action settlements in 2023. *Id.* In light of the risks described below, by any measure, this is an incredible result.

a. The Merits of the Settlement Class's Claims, Weighed Against the Terms of the Settlement, Support Final Approval of the Settlement

"The most important consideration in deciding whether a settlement is fair, reasonable, and adequate is 'the strength of the case for plaintiffs on the merits, balanced against the amount offered in settlement.'" *Wireless*, 396 F.3d at 933. Courts have long recognized that securities fraud class actions like this one present myriad risks that a plaintiff must overcome to ultimately secure a recovery. "'While all cases carry the potential for uncertain verdicts, securities cases in particular are complex and difficult to prove.'" *Tile Shop Holdings*, 2017 WL 2574005, at *3 (also describing "'notorious complexity'" of securities cases).

Lead Plaintiff alleged that Defendants – EarthLink, EarthLink's former Board of Directors, Windstream, the Windstream Board of Directors, and certain Windstream officers – violated federal securities laws by distributing misleading proxy and registration statements to effectuate the Merger (the "Offering Documents"). Knotts Decl., ¶¶15-18. Lead Plaintiff alleged violations of §§11, 12(a)(2) and 15 of the Securities Act of 1933 (the "1933 Act"), §§14(a) and 20(a) of the Securities Exchange Act of 1934 (the "1934 Act") and U.S. Securities and Exchange Commission ("SEC") Rule 14a-9 promulgated thereunder. ECF 74. Lead Plaintiff's Second Amended Complaint alleged that at the time of the Merger, Windstream's business was already crumbling given a pernicious and structurally flawed "disguised financing" transaction that mandated billions in above-market annual "rent" payments. *Id.*, ¶7. As the Court summarized, "Plaintiff's chief complaints are that the

Offering Documents contained misleading half-truths and material omissions regarding Windstream's long-term debt levels and the sustainability of the dividend." ECF 96 at 10.

Lead Plaintiff and Plaintiff's Counsel built a very strong case, but further litigation no doubt involved risk, especially with respect to falsity, materiality, damages, loss causation, and evidentiary proof. *See* Knotts Decl., ¶¶93-108.

Falsity and Materiality. Defendants argued that "[o]mitted facts are only actionable if they are materially inconsistent with the affirmative disclosures. Here, the allegedly omitted facts were fully consistent with the disclosures that Windstream was highly indebted, losing customers, facing intense pricing pressure from big cable and telecom companies and under no obligation to continue paying any dividends." ECF 26 at 8. In addition, Defendants claimed that because Windstream never filed a restatement admitting to any accounting errors, Lead Plaintiff could not plead a claim for misstatements about Windstream's debt levels. ECF 79 at 2-3. While Lead Plaintiff disputes those arguments, they were put forth by very well-capitalized Defendants represented by experienced securities litigation defense firms and, if successful, could result in zero recovery for the putative class.

Damages and Loss Causation. Throughout the litigation, Defendants maintained that, even if liability were established, Lead Plaintiff's claims did not give rise to any cognizable damages. For example, Defendants asserted that "while Plaintiff appears to claim damages based on the stock price decline after Windstream reduced its dividend, such damages cannot be attributed to the Proxy because Windstream's Board had full authority to reduce the dividend (a fact that the Proxy disclosed)." ECF 26 at 25 (parentheses in original). As courts in this Circuit have noted:

> If Plaintiffs were successful in establishing liability, they faced significant risks establishing causation and damages. The parties had retained highly qualified experts whose damages assessments were at considerable variance. Faced with the uncertainty of a jury trial, there existed the real possibility that the amount of damages the Class would actually recover would be zero or only a fraction of the damages Class Representatives contended.

Tile Shop Holdings, Inc., 2017 WL 2574005, at *3.

So too here, Lead Plaintiff would have vigorously disputed those arguments, but they posed a substantial risk. Had a jury accepted Defendants' arguments at trial (even in part), damages could have been significantly reduced, or eliminated entirely. Lead Plaintiff thus faced the prospect of advancing to trial and winning the liability phase, but recovering nothing for the proposed class and losing the case. That is precisely what happened in both the *Trados* and *PLX* merger cases – plaintiffs proved liability in a merger trial, but the court found that damages were zero. *See In re Trados Inc. S'holder Litig.*, 73 A.3d 17 (Del. Ch. 2013) (unfair sale process by fiduciaries nevertheless produced a fair price); *In re PLX Tech. Inc. Stockholders Litig.*, 2018 WL 5018535 (Del. Ch. Oct. 16, 2018) (activist who aided and abetted the board's breach of fiduciary duty was not liable for any damages because the court had determined the amount of damages to be zero).

Challenges from Evidentiary Gaps. While any jury trial is always an uncertain endeavor, the almost decade-long lapse of time between the events at issue here (some of which arose in 2013) and the trial date (November 2024) presented potential gaps in the evidentiary record. Not only did this timing interval cause certain Defendants to apparently forget about the events leading up to the Merger, but it also increased the risk that documents could be deleted or go missing over time. Indeed, both of those issues squarely arose in this case. With respect to witness recollection, former EarthLink board member Garry McGuire testified at deposition "I don't remember" or "I don't recall" a total of 157 times and answered questions with some variation of "this was seven [or eight] years ago" a total of 42 times. ECF 156 at 5-6. Moreover, Plaintiff's Counsel uncovered significant issues of document retention on the part of Defendants. In late January 2024, for example, Defendants disclosed that the emails and documents of four top EarthLink executives during the Merger, including Defendant and CEO Joseph Eazor, had been erased. *Id.* at 1, 5. These issues could have proved challenging at trial.

Moreover, any trial victory for Lead Plaintiff would likely have been appealed by Defendants, which – at a minimum – would have resulted in substantial delays before any class recovery. *See, e.g.*, *Tile Shop Holdings, Inc.*, 2017 WL 2574005, at *3 (describing the "likely post-trial motions and appeals" in a securities case that "would have taken years to resolve, during which time the Class would have received no distribution of any damages award"). The risks associated with establishing liability and damages at trial, and preserving any trial victory through appeal, thus weigh in favor of approving the Settlement. Taking into account such risks, the record-breaking $85 million proposed recovery is most certainly adequate.

b. The Complexity and Expense of Further Litigation Supports Final Approval of the Settlement

Courts have consistently recognized that the complexity, expense, and likely duration of the litigation are critical factors in evaluating the reasonableness of a settlement, especially when the settlement being evaluated is a securities class action. *See, e.g.*, *Phillips v. Caliber Home Loans, Inc.*, 2022 WL 832085, at *3 (D. Minn. Mar. 21, 2022) ("'many of the immediate and tangible benefits' of settlement would be lost through continued litigation, making the proposed settlement 'an attractive resolution' of the case"); *CenturyLink I*, 2020 WL 7133805, at *7 ("even if [Lead Plaintiff] were successful, the . . . costs and risks of continued litigation in such a large, complex case would be significant"). This case, with numerous intricate legal and factual issues – including those related to falsity, loss causation, and damages – was no exception.

Without a settlement, this case would require the expenditure of substantial additional time and money, and "'all the while class members would receive nothing.'" *Wireless*, 396 F.3d at 933. Assuming Lead Plaintiff successfully defeated Defendants' likely motions for summary judgment and to exclude Lead Plaintiff's damages expert, a trial in this case could take weeks and would be a byzantine undertaking for the Court and jurors. And even if Lead Plaintiff prevailed at trial, post-trial motions and appeals certainly would follow, during which time the Settlement Class would

receive no distribution of any damages award. In addition, a post-trial motion or an appeal of any favorable verdict would carry the risk of reversal, in which case the Settlement Class would receive no recovery at all – ever. *See, e.g.*, *Hubbard v. BankAtlantic Bancorp, Inc.*, 688 F.3d 713 (11th Cir. 2012) (overturning a jury verdict in plaintiff's favor in a securities case). Accordingly, analysis of this factor also supports final approval of the Settlement.

4. Defendants' Financial Condition Supports Final Approval of the Settlement

A recent report from Cornerstone summarizing settlements in securities cases observed: "Issuers that have been delisted from a major exchange and/or declared bankruptcy prior to settlement are generally associated with lower [securities] settlement amounts."[2] Here, Windstream and EarthLink both entered and emerged from bankruptcy protection during the Action. Both stocks are no longer listed on any major securities exchange. And the funds available to satisfy a settlement or judgment were being depleted by defense and litigation costs. These issues could have impacted Lead Plaintiff's ability to recover the full extent of potential damages at trial. The corporate defendants, however, were well-funded enough to mount a vigorous defense for years. Despite these facts, Lead Plaintiff was still able to obtain a record-breaking $85 million recovery. Accordingly, this factor weighs strongly in support of final approval of the Settlement.

5. The Reaction of the Settlement Class to Date Supports Final Approval of the Settlement

In accord with this Court's Preliminary Approval Order, the Court-approved Notice and Claim Form were mailed to potential Settlement Class Members who could be identified with reasonable effort and the Summary Notice was published in *The Wall Street Journal* and over *Business Wire*. *See* Declaration of Ross D. Murray Regarding Notice Dissemination, Publication,

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[2] Laarni T. Bulan and Laura E. Simmons, *Securities Class Action Settlements: 2023 Review and Analysis*, at 4 (Cornerstone Research 2024).

and Requests for Exclusion Received to Date ("Ross D. Murray Decl."), ¶¶5-11, submitted herewith. The Notice advises the Settlement Class of the terms of the Settlement and the Plan of Allocation as well as the procedure and deadline for filing objections and requests for exclusion. As of December 30, 2024, over 93,500 copies of the Notices and Claim Forms have been mailed or emailed to potential Settlement Class Members and nominees. *Id.*, ¶10. The objection deadline is January 16, 2025, and to date, no objections have been received to the Settlement, the Plan of Allocation, or Plaintiff's Counsel's request for an award of attorneys' fees and expenses. No requests for exclusion have been received to date either. While these issues will be addressed in additional briefing after the time for objections has passed, the lack of objections thus far indicates strong class-wide support in favor of the Settlement. *See, e.g.*, *Yarrington v. Solvay Pharms., Inc.*, 697 F. Supp. 2d 1057, 1064 (D. Minn. 2010) ("the Court first concludes that the Settlement Class strongly supports Settlement Class Counsel's request for attorneys' fees of 33% of the Settlement Fund, based on the fact that only one untimely objection was made").

6. The Settlement Satisfies the Remaining Rule 23(e)(2) Factors

The remaining factors of Rule 23(e)(2) require courts to consider: (i) the effectiveness of the proposed method for distributing relief; (ii) the terms of the proposed attorneys' fees, including the timing of payment; (iii) the existence of any other "agreements"; and (iv) whether the settlement treats class members equitably relative to each other. Fed. R. Civ. P. 23(e)(2)(C)(ii)-(iv); Fed. R. Civ. P. 23(e)(2)(D). These factors are met here.

a. The Proposed Method for Distributing Relief Is Effective

As described in detail below, the proposed methods of notice and claims administration are effective and provide the Settlement Class Members with the necessary information to receive their *pro rata* share of the Net Settlement Fund. As also detailed below, the notice and claims processes

are similar to those commonly used in securities class action settlements and provide for straightforward cash payments based on the trading information provided.

b. The Requested Attorneys' Fees Are Reasonable

In the Eighth Circuit, "courts have frequently awarded attorneys' fees ranging up to 36% in class actions." *Huyer v. Buckley*, 849 F.3d 395, 399 (8th Cir. 2017). The Eighth Circuit itself has approved a 36% fee award from the total common fund in a complex and difficult contingent case like this one. *See In re U.S. Bancorp Litig.*, 291 F.3d 1035, 1038 (8th Cir. 2002). As set forth in more detail in the accompanying Memorandum of Law in Support of Plaintiff's Counsel's Motion for Attorneys' Fees, Litigation Expenses, and Award to Lead Plaintiff Pursuant to 15 U.S.C. §78u-4(a)(4), Plaintiff's Counsel's request for an award of attorneys' fees of 32% of the common fund is reasonable, appropriate, and well within the range of percentage fees affirmed by the Eighth Circuit and awarded by this Court in common fund cases.

c. The Parties Have No Other Agreements Besides an Agreement to Address Requests for Exclusion

The Settling Parties entered into a supplemental agreement providing Windstream with the ability to terminate the Settlement in the event that valid requests for exclusion from the Settlement Class exceeds certain criteria. *See* Stipulation, ¶7.4. This type of supplemental agreement – which is a common feature of approved securities settlements – is kept confidential to avoid giving a group of opt-outs the leverage to endanger a favorable settlement, to the detriment of the Settlement Class. *See, e.g.*, *In re Centurylink Sales Pracs. & Sec. Litig.*, 2021 WL 3080960, at *7 (D. Minn. July 21, 2021) ("The Court routinely approves class action settlements when there is a confidential agreement allowing the defendant to terminate the settlement if a particular threshold of class members opt out. The existence of such an agreement does not weigh against approval."); *see also In re Signet Jewelers Ltd. Sec. Litig.*, 2020 WL 4196468, at *13 (S.D.N.Y. July 21, 2020) ("This type of

agreement is a standard provision in securities class actions and has no negative impact on the fairness of the Settlement.”).

d. Settlement Class Members Will Be Treated Equitably

Under Rule 23(e)(2)(D), all Settlement Class Members will be treated equitably. As also described below, the Settlement and the Plan of Allocation provide that each Settlement Class Member, including Lead Plaintiff, who submits a valid and timely Claim Form will receive a *pro rata* share of the monetary relief based on the terms of the Plan of Allocation.

Each of the above factors fully supports a finding that the Settlement is fair, reasonable, and adequate, and therefore deserves this Court’s final approval.

IV. THE COURT SHOULD FINALLY CERTIFY THE SETTLEMENT CLASS FOR PURPOSES OF EFFECTUATING THE SETTLEMENT

In the motion for preliminary approval of the Settlement, Lead Plaintiff requested that the Court certify the Settlement Class for settlement purposes. ECF 181 at 12-13. Lead Plaintiff also referred the Court to the previously filed motion for class certification for a complete recitation of the arguments supporting class certification here. *See* ECFs 118-121, 143-144.

In the Preliminary Approval Order, the Court addressed the requirements for class certification as set forth in Rules 23(a) and (b)(3) of the Federal Rules of Civil Procedure. The Court found that Lead Plaintiff had met the requirements for certification of the Settlement Class for purposes of the Settlement. ECF 186, ¶¶2-3. In addition, the Court preliminarily certified Lead Plaintiff as Class Representative and Lead Counsel as Class Counsel. *Id.*, ¶3.

Nothing has changed since the Court’s entry of the Preliminary Approval Order to alter the propriety of the Court’s preliminary certification of the Settlement Class for settlement purposes. Lead Plaintiff respectfully requests that the Court affirm its preliminary certification and finally certify the Settlement Class for purposes of carrying out the Settlement pursuant to Federal Rules of Civil Procedure 23(a) and (b)(3).

V. THE COURT SHOULD APPROVE THE PLAN OF ALLOCATION

The Notice contains a Plan of Allocation, which details how the Settlement proceeds are to be divided among Settlement Class Members who submit valid and timely claims. *See* Ross D. Murray Decl., Ex. A (Notice). Assessment of a plan of allocation in a class action under Rule 23 is governed by the same standards of review applicable to the settlement as a whole – the plan must be fair, reasonable, and adequate. *See Lechner v. Mut. of Omaha Ins. Co.*, 2021 WL 424421, at *4 (D. Neb. Feb. 8, 2021) ("The Plan of Allocation for the Settlement Fund is approved as fair, reasonable, and adequate.").

This proposed Plan of Allocation is fair, reasonable, and adequate. The objective of the Plan of Allocation is to equitably distribute the Net Settlement Fund among Settlement Class Members based on their respective economic losses resulting from the alleged misrepresentations and omissions in the Offering Documents. Knotts Decl., ¶¶109-112. It was prepared with the assistance of Lead Counsel's loss causation and damages expert and calls for the distribution of the Net Settlement Fund on a *pro rata* basis, as determined by the ratio between each valid claim and the sum of all valid claims. *Id.*

In this case, given the similarity of the claims and damages issues brought under both the 1933 Act and the 1934 Act, as well as the specific statutorily-prescribed methodology for calculating damages under the 1933 Act, the statutory damages formula set forth in §11(e) of the Securities Act serves as the basis for the calculation of the Recognized Loss Amounts under the Plan of Allocation. *Id.* The Plan of Allocation therefore generally tracks the statutory §11(e) formula. *Id.* Under the Plan of Allocation, each eligible Settlement Class Member's "Recognized Loss Amount" is calculated according to the detailed formulas described in the Notice. *Id.* Once each claim is calculated and verified, and the distribution ratio is determined, the Net Settlement Fund shall be

distributed to Authorized Claimants who are entitled to a distribution of at least $10.00. Ross D. Murray Decl., Ex. A (Notice at 7).

If there is any balance remaining in the Net Settlement Fund after the initial distribution, and it would be feasible and economical to conduct a further distribution, Verita Global will conduct a further distribution of remaining funds among Authorized Claimants who cashed their initial checks. Any *de minimis* balance that still remains after re-distributions and after payment of outstanding expenses and Taxes, if any, shall be contributed to Legal Aid of Arkansas. *Id.* at 29-30. *See Caligiuri v. Symantec Corp.*, 855 F.3d 860, 867 (8th Cir. 2017) (approving similar distribution and charitable donation "'when it is not feasible to make further distributions to class members'").

Courts routinely approve substantially similar methods of distributing recoveries in securities class actions such as this one, and Lead Plaintiff respectfully submits that the Court should approve the Plan of Allocation submitted here. *See, e.g.*, *Campbell v. Transgenomic, Inc.*, 2020 WL 2946989, at *5 (D. Neb. June 3, 2020) (finding "formula for the calculation of the claims of the authorized claimants" was "a fair and reasonable basis upon which to allocate the proceeds of the settlement fund"); *Christine Asia Co., Ltd. v. Yun Ma*, 2019 WL 5257534, at *14 (S.D.N.Y. Oct. 16, 2019) ("This type of claims processing and method for distributing settlement proceeds is standard in securities and other class actions and is effective.").

VI. NOTICE COMPLIES WITH RULE 23, DUE PROCESS, AND THE PRELIMINARY APPROVAL ORDER

Rule 23(e) provides that "[t]he court must direct notice in a reasonable manner to all class members who would be bound by the proposal." Fed. R. Civ. P. 23(e)(1)(B). In addition, Rule 23(c)(2)(B) requires that a certified class receive "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). The standard for measuring the adequacy of a class action

settlement notice is reasonableness. The notice must satisfy the "'broad "reasonableness" standards imposed by due process.'" *Petrovic*, 200 F.3d at 1153.

Here, the Notice and Summary Notice were approved by the Court in the Preliminary Approval Order (ECF 186), and fully comply with Rule 23. Among other disclosures, the Notice apprises Settlement Class Members of the nature of this litigation, the definition of the Settlement Class, the claims and issues in the litigation, the claims that will be released in the Settlement, and the requested attorneys' fees and expenses. Ross D. Murray Decl., Ex. A (Notice). The Notice also: (i) advises that a Settlement Class Member may enter an appearance through counsel; (ii) describes the binding effect of a judgment on Settlement Class Members; (iii) states the procedures and deadline for Settlement Class Members to object or request exclusion; (iv) states the procedures and deadline for submitting a Claim Form; and (v) provides the details for the Settlement Hearing. *Id.* In addition, the Notice and Summary Notice satisfy the Private Securities Litigation Reform Act of 1995's disclosure requirements (15 U.S.C. §78u-4(a)(7)). *Id.* The contents of the Notice and Summary Notice therefore satisfy all applicable requirements.

The notice program has since been carried out. The Claims Administrator, Verita Global, commenced mailing the Notice and Claim Form on November 5, 2024 to all Settlement Class Members who could be reasonably identified, as well as to Verita Global's large database of banks, brokers, and other nominees. *See* Ross D. Murray Decl., ¶¶5-8. As a result of these efforts, a total of 93,549 copies of the settlement notice packets have been sent. *Id.*, ¶10. On November 12, 2024, Verita Global caused the Summary Notice to be published in *The Wall Street Journal* and over *Business Wire*, and posted copies of all relevant documents on the Settlement website, www.earthlinkmergersettlement.com. *Id.*, ¶¶11, 13. This extensive notice program leaves no stone unturned and is "the best notice . . . practicable under the circumstances." Fed. R. Civ. P. 23(c)(2)(B). Or, in the words of the Eighth Circuit when affirming approval of a similar notice plan:

"the mailed notice provided a reasonable summary of the stakes of the litigation, and class members could easily acquire more detailed information, including data on potential individual awards, through the telephone number that was provided. Due process requires no more." *Petrovic*, 200 F.3d at 1153.

VII. CONCLUSION

Under any measure, the $85 million Settlement before the Court for approval is an outstanding culmination of this long-running litigation. Further, the proposed Plan of Allocation is an equitable method by which to distribute the Net Settlement Fund. For all the reasons stated above and in the accompanying declarations, Lead Plaintiff respectfully requests that the Court grant this motion for final approval of the Settlement and the Plan of Allocation as fair, reasonable, and adequate.

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Respectfully submitted,

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