UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

FULTON COUNTY EMPLOYEES' RETIREMENT SYSTEM, Derivatively on Behalf of THE GOLDMAN SACHS GROUP, INC., Plaintiff, v. LLOYD BLANKFEIN, DAVID M. SOLOMON, M. MICHELE BURNS, MARK A. FLAHERTY, WILLIAM W. GEORGE, JAMES A. JOHNSON, ELLEN J. KULLMAN, LAKSHMI N. MITTAL, ADEBAYO O. OGUNLESI, PETER OPPENHEIMER, DAVID A. VINIAR, and MARK O. WINKELMAN, Defendants, and THE GOLDMAN SACHS GROUP, INC., Nominal Defendant.	Case No. 1:19-cv-1562 (VSB)

PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF UNOPPOSED MOTION FOR PRELIMINARY APPROVAL OF SETTLEMENT

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Plaintiff Fulton County Employees' Retirement System ("Plaintiff")[1] respectfully submits this memorandum of law in support of its unopposed motion for preliminary approval of the proposed settlement (the "Proposed Settlement" or the "Settlement") of the above-captioned shareholder derivative action (the "Action") brought on behalf of nominal defendant The Goldman Sachs Group, Inc. ("Goldman Sachs," "Goldman" or the "Company") on the terms set forth in the Stipulation and Agreement (the "Stipulation") filed concurrently with this memorandum. The Parties'[2] agreed-upon Order Preliminarily Approving Derivative Settlement and Providing for Notice (the "Preliminary Approval Order") is attached as Exhibit A to the Stipulation.

I. PRELIMINARY STATEMENT

Plaintiff initiated this Action against numerous current and former directors and officers of Goldman Sachs in connection with a corporate scandal involving the Malaysian sovereign wealth fund 1MDB, for which Goldman affiliates underwrote three bond issuances in 2012 and 2013. Plaintiff is now pleased to report that, following three years of litigation over what has been described as "the most difficult theory of corporate law," Plaintiff submits that it has secured a highly favorable Settlement that confers two important categories of benefits on the Company.

First, the Settlement obtains a $79.5 million cash recovery for Goldman (the "Monetary Consideration"), which funds are to be used entirely for the Company's compliance purposes and the implementation of the Settlement's corporate governance measures. Significantly, the Monetary Consideration represents an outstanding recovery for the Company, as it ranks as the second-largest shareholder derivative settlement ever in the Second Circuit.

[1] Unless otherwise indicated, all capitalized terms have the same meaning as in the Stipulation dated May 13, 2022, filed concurrently herewith; all citations are omitted; and all emphasis is added.

[2] The "Parties" are Plaintiff, Nominal Defendant Goldman Sachs, and the "Individual Defendants" Lloyd Blankfein, M. Michele Burns, Mark A. Flaherty, William W. George, James A. Johnson, Ellen J. Kullman, Lakshmi N. Mittal, Adebayo O. Ogunlesi, Peter Oppenheimer, David M. Solomon, David A. Viniar, and Mark O. Winkelman.

Second, the Settlement includes various corporate governance measures that are designed to strengthen the Company's internal controls and prevent future wrongdoing at the Company. These measures—which were designed by Plaintiff with the assistance of a renowned corporate governance expert, Columbia Law School Professor Jeffrey N. Gordon—include: (i) the extension of the Corporate Compliance Program provisions set forth in Goldman's Deferred Prosecution Agreement (the "DPA") with the DOJ, which had been set to expire on October 22, 2023; (ii) enhancements to the authority of the Chief Compliance Officer ("CCO"); (iii) maintenance of an anonymous employee hotline with reporting to the CCO; and (iv) designation of an external party to monitor public media and industry reports that may raise compliance concerns.

All parties to the litigation support the Settlement. Indeed, Plaintiff submits that the Settlement is an excellent result for Goldman Sachs and its current shareholders and avoids highly uncertain, risky, and protracted litigation. It is also the product of extensive, arm's-length negotiations, including a two-day mediation before two nationally recognized and renowned mediators, the Hon. Daniel Weinstein (Ret.) and Jed D. Melnick, which culminated in a mediator's proposal to settle the Action on the terms set forth herein. As detailed below, the Settlement is unquestionably fair, reasonable, and adequate, and warrants the Court's preliminary approval.

At this preliminary approval stage, the Court need only make a preliminary evaluation of the Settlement's fairness, such that notice should be issued to Goldman Sachs shareholders and a final Settlement Hearing can be scheduled. Here, the Settlement satisfies each of the factors relevant on a motion for preliminary approval. Plaintiff aggressively prosecuted this case on behalf of the Company and developed a deep understanding of the strengths and weaknesses of its claims. Notwithstanding its confidence in the merits of the claims, Plaintiff recognized the challenge of establishing that demand was futile, and if so, that Defendants breached their fiduciary duties by

consciously disregarding their oversight responsibilities with respect to Goldman's involvement in the 1MDB deals. While this *Caremark* claim is widely considered "the most difficult theory in corporation law upon which a plaintiff may hope to win a judgment," *In re Caremark Int'l Inc. Derivative Litig.*, 698 A.2d 959, 967 (Del. Ch. 1996), this difficulty was heightened here, as the 1MDB transactions occurred almost a decade ago and predated many of the Individual Defendants' tenures at Goldman. As a result, Plaintiff not only recognized the risk and uncertainty of establishing liability at trial, but also of successfully establishing demand futility at the pleading stage—a threshold requirement that Defendants vigorously contested.

Given these and other risks inherent in this derivative litigation, Plaintiff submits that the Settlement represents an outstanding result that secures meaningful benefits for Goldman and its shareholders, while avoiding the prospect of no recovery at all. Thus, the Settlement is in the best interest of Goldman and its shareholders and meets all the requirements of Federal Rule of Civil Procedure 23.1, due process, and applicable case law. Accordingly, Plaintiff respectfully requests that the Court grant preliminary approval of the Proposed Settlement, approve the form and manner of the Parties' proposed Notice and Summary Notice, and schedule a final Settlement Hearing.

II. BACKGROUND AND PROCEDURAL HISTORY

A. Factual Background

As alleged in the Complaint, this Action centers on a criminal conspiracy involving the Malaysia sovereign wealth fund 1MDB. Beginning in March 2012, 1MDB engaged Goldman as the sole bookrunner on a series of three bond offerings, totaling $6.5 billion, that were among the largest of their kind ever in Asia. ¶64.[3] Goldman Sachs obtained the business through a bribery scheme orchestrated by Malaysian financier Jho Low, a close associate of former Malaysian prime

[3] All "¶__" references are to the Verified Second Amended Shareholder Derivative Complaint (the "Complaint").

minister Najib Razak. ¶2. After each of the three 1MDB bond transactions closed in May 2012, October 2012, and March 2013, hundreds of millions of dollars of the proceeds were immediately diverted to shell companies controlled by Low, who distributed the funds to corrupt Malaysian officials and their associates. ¶¶2, 81, 94, 104. The siphoned assets were used to, among other things, fund lavish personal lifestyles, finance the production of *The Wolf of Wall Street*, and rig a Malaysian election. *Id*. In total, over half of the $6.5 billion bond proceeds were stolen from 1MDB; for its part, Goldman earned over $600 million in fees from the deals. ¶¶10, 105-106.

As Goldman acknowledged in its Deferred Prosecution Agreement (the "DPA") with the U.S. Department of Justice ("DOJ"), Goldman bankers arranged and underwrote the deals despite several red flags of illegal activities. ¶¶162-185. Plaintiff sought to hold Goldman's Board of Directors accountable for breaching their fiduciary duties by disregarding these red flags and by failing to implement appropriate internal controls and reporting systems. The red flags included:

The suspicious terms of the deals. The Complaint alleged that the size of the deals (totaling $6.5 billion) (¶168), their pricing (double the cost of comparable bonds) (¶72), their rapid-fire succession (¶168), the lack of identifiable uses for the proceeds (¶¶168-71), their private placement structure (¶¶71, 75), and Goldman's excessive fees (200 times the typical fees in similar offerings) (¶106), all made the deals highly suspicious on their face, to the point that other investment banks declined work on the deals because they "smacked of political corruption." ¶77.

The involvement of suspicious individuals. Internal Goldman emails cited in the DPA provide that numerous Goldman bankers knew that Jho Low—the mastermind of the scheme and the right hand of the corrupt Malaysian prime minister—was involved in the deals, despite previously being rejected as a client by Goldman's private wealth division. ¶¶58, 61-62, 65-66, 173-182. Despite these known red flags, Goldman executives attended meetings with Low on at

least three occasions, including at Goldman's New York headquarters. ¶¶95, 117, 130.

Senior Goldman executives and prominent financial media criticized the deals. As the Complaint alleged, multiple Goldman bankers contemporaneously criticized the deals, calling out their "insane pricing and bizarre structure"; noting that "[t]he pricing is nuts, what is the use of the funds?"; and questioning: "What the f**k is going on with this?" ¶¶67-70. Despite these objections, these bankers were effectively silenced. *Id*. Furthermore, Goldman acknowledged in the DPA that after the 1MDB deals were completed, the transactions were subject to criticism and negative media reporting. The Complaint alleged that the *Financial Times* and *Bloomberg*, among other financial media outlets, questioned the propriety of the deals. ¶¶ 89-90, 101, 183.

In addition to these red flags, the DPA highlighted Goldman's internal control failures in enabling the 1MDB offerings, including Goldman bankers' failure to verify how the funds were used; Goldman's compliance team's failure to review the deal team's emails (which would have detected Low's involvement); and Goldman's failure to ensure that concerns about corporate misconduct related to 1MDB were properly escalated pursuant to its escalation policy. ¶¶168-195.

In October 2020, Goldman announced that it and certain of its affiliates entered into multiple criminal and civil resolutions pertaining to 1MDB, which resulted in over $5 billion in fines, penalties, and disgorgement. ¶¶142, 160-165. Goldman also announced in October 2020 that significant compensation actions were implemented against several current and former officers and other employees, including approximately $174 million in clawbacks, forfeitures and compensation reductions, based on Goldman's acknowledgement of the Company's institutional failures related to the 1MBD transactions. Goldman bankers Tim Leissner and Roger Ng were indicted, with Leissner pleading guilty and Ng convicted of conspiracy and other corruption charges in April 2022. ¶¶129, 132-33.

B. Procedural Background

On February 19, 2019, Plaintiff commenced the Action. ECF No. 1. On July 12, 2019, Plaintiff filed a Verified Amended Shareholder Derivative Complaint ("Amended Complaint"). ECF No. 35. Defendants filed their motion to dismiss on September 12, 2019. *See* ECF Nos. 39-42. Plaintiff filed its opposition on November 5, 2019, and Defendants filed their reply in support of their motion to dismiss on December 20, 2019. *See* ECF Nos. 43-45.

While Defendants' motion to dismiss was pending, on October 22, 2020, Goldman entered into the DPA with the DOJ. *See* ECF No. 63-67. On November 16, 2020, the Court granted Plaintiff's motion for leave to file its Second Verified Amended Shareholder Derivative Complaint ("Complaint" or "Second Amended Complaint"). ECF No. 68. Plaintiff filed its Second Amended Complaint in order to incorporate information set forth in the DPA's Statement of Facts. *See* ECF No. 67. The Complaint asserts seven counts: (i) breach of fiduciary duty against the Director Defendants; (ii) breach of fiduciary duty against Defendant Blankfein; (iii) unjust enrichment against all Defendants; (iv) contribution and indemnification against all Defendants; (v) violations of § 10(b) of the Securities Exchange Act of 1934 (the "Exchange Act') against all Defendants; (vi) breach of fiduciary duty for insider selling against Defendants Blankfein, Solomon, and Viniar; and (vii) violations of § 14(a) of the Exchange Act against the Director Defendants. Defendants moved to dismiss the Complaint on January 15, 2021, Plaintiff filed its opposition brief on March 19, 2021, and Defendants filed their reply in further support of their motion to dismiss on May 7, 2021. *See* ECF Nos. 74-80. Plaintiff filed multiple notices of supplemental authority after the motions to dismiss were briefed, notifying the Court of four recent opinions in which courts upheld *Caremark* duty of oversight claims. *See* ECF Nos. 55, 58, 81. The motion to dismiss was *sub judice* at the time of the Settlement.

C. Mediation and Discovery

In November 2021, Defendants approached Plaintiff's Counsel about participating in a mediation to attempt to resolve the litigation. The parties engaged the highly experienced mediation team consisting of the Hon. Daniel Weinstein (Ret.) and Jed D. Melnick to oversee the two-day mediation, which took place in person in Boca Raton, Florida on February 2-3, 2022. In the weeks leading up to the mediation, the parties engaged in numerous conferences and meetings at which they discussed the strengths and weaknesses of the Action; held preliminary negotiations; and exchanged detailed mediation statements. The mediation was attended by Plaintiff's counsel, Defendants' counsel, representatives of Goldman, and representatives of Goldman's directors' and officers' ("D&O") insurance carriers. On the second day of mediation, Judge Weinstein made a mediator's proposal, which the parties accepted on February 3, 2022.

In connection with the Settlement, Plaintiff conducted substantial discovery to confirm its assessment that the Settlement is fair, adequate and reasonable, including access to, reviewing and analyzing confidential Goldman documents comprising over 667,000 pages. After Plaintiff completed this discovery and confirmed its assessment, the Parties negotiated the Stipulation finalizing the terms and conditions of the Settlement, which was executed on May 13, 2022.

III. SETTLEMENT TERMS

The terms of the Settlement, which all Parties fully support, are summarized below.

Consideration. The Proposed Settlement contains two components. *First*, the Insurers, on behalf of the Individual Defendants, will pay the $79.5 million Monetary Consideration to Goldman, to be used entirely for the Company's compliance activities, including but not limited to funding the compliance measures referenced below. Stipulation, §B(1). *Second*, Goldman will adopt and/or continue to maintain the significant corporate governance reforms detailed in Section

B of the Parties' Settlement Stipulation. *Id.,* §B(2). Specifically, for a period of three years (unless otherwise indicated):

a) Extension of the Corporate Compliance Program Provisions. Goldman shall extend the provisions of the DPA's Corporate Compliance Program (detailed in Attachment C to the DPA, and attached as Exhibit A hereto), for one year following the expiration of the DPA on October 22, 2023. The Corporate Compliance Program requires the Company to enhance its internal controls and compliance programs to, among other things, maintain: (i) an effective system of internal accounting controls; and (ii) a rigorous anti-corruption compliance program.

b) Enhancements to Authority of the Chief Compliance Officer. Goldman's CCO shall report to the Board (or the Audit Committee of the Board) on a periodic basis (but at least quarterly) and shall also have the necessary resources to hire a dedicated internal investigatory staff and be empowered to hire external investigators where, in the CCO's discretion, it is appropriate to do so.

c) Maintenance of an Anonymous Hotline with Reporting to the CCO. The Company shall maintain an anonymous hotline that employees may use to report matters to the CCO, which will be managed by the Company's Compliance Department.

d) Maintain an External Monitoring Channel. The Company shall designate an outside party to monitor public media and industry reports that may raise compliance concerns involving Goldman, and that external party shall report any such issues directly to the CCO on a periodic basis.

The import of these governance improvements will be discussed in greater detail in a declaration by Professor Gordon accompanying Plaintiff's motion for final settlement approval.

Release. In exchange for the consideration described above, the Proposed Settlement provides that Plaintiff will provide a customary global release on behalf of the Company, of all derivative claims arising from facts alleged in the Action. Notably, however, the Proposed Settlement does not release any claims for recoupment of compensation the Company has or may have against Tim Leissner or Roger Ng. Stipulation, §A(19). Nor does the Proposed Settlement release any direct claims of Plaintiff or any other Goldman stockholder, including without limitation any direct claims asserted under the federal securities laws (including those direct claims being prosecuted in the related action before this Court captioned *Sjunde AP-Fonden v. The Goldman Sachs Group, Inc. et. al*., No. 1:18-cv-12084-VSB (S.D.N.Y.)).

Attorneys' Fees and Service Award. In accordance with the Proposed Settlement, Plaintiff intends to seek a Court-approved award of attorneys' fees up to 25% of the Monetary Consideration. While such matters are not the subject of any agreement between Plaintiff and Defendants other than as set forth in the Stipulation, Goldman and the Individual Defendants have agreed not to object to or otherwise challenge any reasonable attorneys' fee and expense request, so long as Plaintiff does not apply to the Court for an award of fees and expenses that exceeds 25% of the Monetary Consideration. *See* Stipulation, §G(1)-(2). In addition, Plaintiff may seek the Court's permission to pay a Service Award to Plaintiff, with the requested amount to be deducted from the Court-awarded attorneys' fees.

IV. ARGUMENT

A. The Court Should Grant Preliminary Approval of the Proposed Settlement

Pursuant to Federal Rule of Civil Procedure 23.1(c), "[a] derivative action may be settled . . . only with the court's approval." Public policy favors settlements of complex litigation, and of shareholder derivative litigation in particular, because such actions are "notoriously difficult and

unpredictable." *In re AOL Time Warner S'holder Deriv. Litig.*, 2006 WL 2572114, at *3 (S.D.N.Y. Sept. 6, 2006). Approval of a derivative action settlement typically proceeds in two steps. First, the Court preliminarily reviews the proposed settlement to determine whether it is sufficient to warrant public notice and a hearing. Second, the Court then considers final approval of the settlement in a settlement hearing, after notice of settlement is provided to shareholders. *See Manual for Complex Litigation* § 13.14, at 173 (4th ed. 2004). At the fairness hearing, the Court will then make a final determination as to whether the Proposed Settlement is "fair, reasonable, and adequate." *Weinberger v. Kendrick*, 698 F. 2d 61, 73 (2d. Cir. 1982). "The role of the court and the criteria considered in evaluating the adequacy and fairness of a derivative settlement are substantially the same as in the class action." 7 Alba Conte & Herbert Newberg, Newberg on Class Actions § 22.110, at 476 (4th ed. 2002).

The standards for preliminary approval are not as stringent as those for final approval. "To grant preliminary approval, the court need only find that there is 'probable cause to submit the settlement to class members and hold a full-scale hearing as to its fairness.'" *Balestra v. ATBCOIN LLC*, 2022 WL 950953, at *2 (S.D.N.Y. Mar. 29, 2022) (Broderick, J.). Thus, preliminary approval should be granted "where the proposed settlement appears to be the product of serious, informed, non-collusive negotiations, has no obvious deficiencies…and falls within the range of possible approval." *Id.* As summarized below, and as will be detailed further in a motion for final approval of the Settlement, the Settlement here easily satisfies all relevant factors.[4]

[4] At final approval, the Court will be asked to review the factors identified in *City of Detroit v. Grinnell Corp.*, 495 F. 2d 448, 463 (2d. Cir. 1974): (1) the expense, complexity, and likely duration of the litigation; (2) the class's reaction to the settlement; (3) the stage of the proceedings and amount of discovery completed; (4) the risks of establishing damages; (5) the risks of establishing liability; (6) the risks of maintaining the class throughout the litigation; (7) defendants' ability to withstand greater judgment; (8) the range of reasonableness of the settlement amount considering the best possible recovery; and (9) the range of reasonableness of the settlement amount given the risks of litigation. Recent amendments to Rule 23(e), which govern class actions rather than derivative suits but may be relevant by analogy, now requires courts to consider at final approval whether: (i) class representatives and class counsel have

1. The Proposed Settlement is the Product of Serious, Informed, Non-Collusive Negotiations

"A strong initial presumption of fairness attaches to a proposed settlement if it is reached by experienced counsel after arm's length negotiations, and great weight is accorded to counsel's recommendation." *Guevoura Fund Ltd. V. Sillerman,* 2019 WL 6889901, at *6 (S.D.N.Y. Dec. 18, 2019); *Clark v. Ecolab Inc.*, 2010 WL 1948198, at *4 (S.D.N.Y. May 11, 2010) ("Absent fraud or collusion, [courts] should be hesitant to substitute [their] judgment for that of the parties who negotiated the settlement."). Further, the participation of a mediator supports the presumption that a settlement is fair. *See D'Amato v. Deutsche Bank*, 236 F.3d 78, 85 (2d Cir. 2001) (a "mediator's involvement in . . . settlement negotiations helps to ensure that the proceedings were free of collusion and undue pressure"); *Puglisi v TD Bank, N.A.*, 2015 WL 574280, at *2 (E.D.N.Y. Feb. 9, 2015) (mediator's participation "reinforces the non-collusive nature of the settlement.").

Here, there can be no question that the Proposed Settlement results from negotiations that were extensive, serious and non-collusive. *See* Stipulation at ¶E (the Parties agree that they "engaged in extensive arm's-length settlement negotiations"). Indeed, the Settlement results from intense, arm's-length negotiations during a two-day mediation facilitated by retired Judge Daniel Weinstein and Jed Melnick, who are preeminent mediators of complex litigation. Numerous courts throughout the country have acknowledged the involvement of Judge Weinstein and Mr. Melnick as a strong factor weighing in favor of settlement approval. *See e.g., Lewis v. YRC Worldwide Inc.,* 2021 WL 4123315, at *3 (N.D.N.Y. Sept. 9, 2021) ("The Court finds that the proposed

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adequately represented the class; (ii) the proposal was negotiated at arm's length; (iii) the relief provided for the class is adequate; and (iv) the proposals treat class members equitably. Fed. R. Civ. P. 23(e)(2). These amendments to the Rule were not intended to "displace" the factors developed by the Circuit Courts. *See* Fed. R. Civ. P. 23(e)(2) 2018 Advisory Comm. Notes; *see Mikhlin v. Oasmia Pharm. AB,* 2021 WL 1259559, at *2 (E.D.N.Y. Jan. 6, 2021) (these factors "add to rather than displace, the *Grinnell* factors" traditionally considered by the courts within the Second Circuit). Consistent with case law governing derivative settlements, these factors reflect both procedural concerns (*e.g.*, the conduct of the litigation and of negotiations leading to the proposed settlement) and substantive concerns (*e.g.*, the relief provided). *See* Fed. R. Civ. P. 23(e)(2) 2018 Advisory Comm. Notes.

Settlement resulted from serious, informed, non-collusive negotiations conducted at arm's length by the Settling Parties and their experienced counsel – under the auspices of retired California Superior Court Judge Daniel Weinstein and Jed Melnick, Esq. serving as mediators – and was entered into in good faith"); *In re Wells Fargo & Co. S'holder Deriv. Litig.*, 2019 WL 13020734, at *5 (N.D. Cal. May 14, 2019) ("That the major terms of the Settlement came from Judge Weinstein's proposal further supports the procedural fairness of the Settlement."); *In re China Med. Corp. Sec. Litig.*, 2014 WL 12581781, at *4 (C.D. Cal. Jan. 7, 2014) ("Mr. Melnick's involvement in the settlement supports the argument that it is non-collusive").

Moreover, Plaintiff was unquestionably adequately informed concerning the facts giving rise to this Action, and the strengths and weaknesses of its case, prior to negotiating the Proposed Settlement. Plaintiff's Counsel extensively investigated the 1MDB scandal over the course of drafting three complaints, including, among other things, reviewing SEC filings, analyst reports, and news articles. Additionally, the Parties engaged in substantial briefing in connection with the motion to dismiss, and the Parties exchanged detailed confidential mediation statements in advance of the mediation. In connection with the Parties' agreement in principle to resolve the case, reached during the second day of mediation, Plaintiff reserved its right to conduct significant and necessary discovery to confirm that the Settlement is fair, adequate and reasonable. *See* Stipulation at ¶F. Plaintiff then received access to and reviewed more than 667,000 pages of internal confidential Goldman documents, which, among other materials, included documents previously produced to the plaintiffs in the pending securities fraud class action and to other shareholders in connection with various books-and-records demands. *See In re Graña y Montero S.A.A. Sec. Litig.*, 2021 WL 4173684, at *13 (E.D.N.Y. Aug. 13, 2021) ("The parties have not engaged in formal discovery. Nevertheless, the various official investigations and subsequent media reports

offer a great deal of insight into the veracity of Plaintiffs' allegations against Defendants;" approving settlement where no confirmatory discovery had been conducted); *In re PPDAI Group Inc. Sec. Litig*., 2022 WL 198491, at *10 (E.D.N.Y. Jan. 21, 2022) (same).

In sum, the Settlement was reached after extensive, arm's-length negotiations by experienced counsel who were thoroughly informed of the strengths and weaknesses of their case, warranting preliminary approval. *See Balestra*, 2022 WL 950953, at *3 ("I have reviewed the proposed Settlement Agreement, and I find that it is the result of arm's length negotiation between the parties, who were, at the time, both represented by experienced and sophisticated counsel").

2. The Proposed Settlement Falls Within the Range of Possible Approval and Has No Obvious Deficiencies

The Settlement also has no obvious deficiencies and "is within the range of approval considering the risks in proving liability." *Balestra,* 2022 WL 950953, at *3. Indeed, it is one of the largest settlements of a shareholder derivative action in the history of the Second Circuit, including both a substantial monetary recovery and significant internal reforms tailored to improve Goldman's corporate governance and prevent the recurrence of misconduct going forward.

a. The $79.5 Million Monetary Component of the Proposed Settlement Represents a Highly-Favorable Recovery

The $79.5 million monetary component is the second largest settlement of a shareholder derivative action in the history of the Second Circuit. The Monetary Consideration is especially valuable here because Goldman has agreed that the entirety of these funds, after the payment of attorneys' fees, will be used solely for compliance purposes. This substantial monetary component and its specified use addresses the gravamen of Plaintiff's allegations—that the 1MDB transactions would not have occurred had Goldman's controls been more robust. The earmarking of these funds for compliance spending is an important "get" for the Company and its shareholders, as monetary recoveries in derivative actions typically can be used for any corporate purpose.

Importantly, even assuming that Plaintiff would succeed at trial, a damages award after trial likely could not be earmarked for spending on compliance activities.

Though Plaintiff believed that its claims were strong and had confidence in its ability to prevail on the merits at trial, Plaintiff also identified certain risks inherent in pressing further litigation in lieu of the Proposed Settlement. Shareholder derivative actions are "notoriously difficult and unpredictable," *AOL Time Warner*, 2006 WL 2572114, at *3, and besides the time-value of money, litigating this Action even through the pleading stage, not to mention through summary judgment, trial and possible appeals, was fraught with substantial risks. In particular, Plaintiff's core *Caremark* fiduciary duty of oversight claim is especially difficult to prove. To succeed, Plaintiff bears the burden of establishing that the Defendants either (a) "utterly failed to implement any" oversight mechanisms, or (b) having implemented such mechanisms, "consciously failed to monitor" their operations. *Stone ex rel. AmSouth Bancorporation v. Ritter,* 911 A. 2d 362, 370 (Del. 2006) (citing *Caremark).* As the Delaware Chancery Court noted, the theory of liability advanced through such a claim "is possibly the most difficult theory in corporation law upon which a plaintiff might hope to win a judgment." *Caremark,* 698 A. 2d at 967; *see also, In re Pfizer Inc. Shareholder Deriv. Litig.,* 780 F. Supp. 2d 336, 342 (S.D.N.Y. 2011) (citing the "substantial risks" posed by a *Caremark* claim as a factor weighing in favor of settlement approval); *Wells Fargo*, 2019 WL 13020734 at *6 (in granting preliminary approval, court noted the difficulty of *Caremark* claims in particular, and derivative claims in general).

This risk was particularly heightened here, as Plaintiff had not yet overcome Defendants' motion to dismiss, which was *sub judice* at the time of the Settlement. With respect to the threshold issue of demand futility, Defendants had argued that the relevant Board composition for the Court's demand futility analysis was the Board as it was comprised on the date that the most recent

complaint was filed (i.e. in November 2020). At that time, only five of the eleven then-current Goldman Board members were directors at the time of the 1MDB deals, and thus Defendants had credible arguments that demand was ***not futile*** given that a majority of Goldman's Board were not even directors at the time of the transactions. Additionally, even with respect to the potential liability of those directors that served on the Board at the time of the 1MDB deals, Defendants argued that the Board had implemented adequate systems and controls at the Company, that directors of a major global investment bank like Goldman are not expected to micromanage the Company's day-to-day business activities, and that none of the directors relevant to the demand futility analysis personally approved or even had contemporaneous knowledge of the 1MDB transactions. Indeed, none of the Individual Defendant board members was criminally or civilly charged by regulators in connection with the scandal. Moreover, with respect to the two Goldman bankers that were criminally indicted, Leissner admitted that he intentionally circumvented Goldman's internal controls and violated its policies, and Defendants argued that those admissions would undercut Plaintiff's arguments related to the Board's alleged breaches of fiduciary duty.

An additional risk to recovery was that, if the court denied the motion to dismiss, Goldman would form a special litigation committee ("SLC") that would be charged with investigating the derivative claims at issue. If an SLC were created, it would seek to stay the litigation pending the completion of the SLC's investigation. Notably, Goldman had already formed an independent Committee in June 2019 to consider demands from three shareholders to investigate and pursue claims based on 1MDB and related internal controls. In January 2021, the Committee, which had been represented by sophisticated, independent counsel, presented the results of its investigation to the directors, and the Board voted to reject the shareholder demands. *See* Goldman 2021 Form 10-K, filed with the SEC on Feb. 25, 2022 at 210, attached as Exhibit B hereto. Thus, Plaintiff

faced a significant risk that an SLC here would reach the same conclusion and that the Board would seek to terminate the litigation, which would result in no monetary recovery or governance reforms for the Company. *See Diep on behalf of El Pollo Loco Holdings, Inc. v. Sather,* 2021 WL 3236322 (Del. Ch. July 30, 2021) (following court's denial of motion to dismiss, company appointed an SLC to investigate plaintiff's claims; after investigation, SLC filed motion to dismiss shareholder derivative litigation, which was granted by the court). Against this background, it is telling that no other shareholder filed a complaint alleging demand futility or challenging the propriety of a demand refusal by the current Goldman Board or the Committee—a fact that underscores the risk and uncertainty inherent in this Action.

Even if Plaintiff would have prevailed in the demand futility analysis at the pleading stage, at summary judgment and at trial, and avoided an adverse SLC-related outcome, any judgment would invariably be subject to extended appeals, injecting further risk and uncertainty into the equation. *See Balestra*, 2022 WL 950953, at *3 ("I must 'balance[ ] the benefits afforded the [shareholders], including the immediacy and certainty of a recovery, against the continuing risks of litigation…'"). Furthermore, the recovery of damages in this litigation would be further complicated by the complexities of director and officer insurance policies covering the alleged misconduct. A settlement provides the advantage of immediacy, allowing the Company to benefit from a cash payment without having to await additional appeals or potential litigation between Defendants and their insurers. *See Wells Fargo,* 2019 WL 13020734, at *6 (noting "prospect of additional or collateral litigation with Individual Defendants' insurers, further prolonging any resolution beneficial to" the company); *In re Galena Biopharma, Inc. Deriv. Litig.,* 2016 WL 10840600, at *2 (D. Or. June 24, 2016) (noting the individual defendants' "insurers dispute

coverage and if the Action does not settle and continues to be litigated, there is a risk that insurance coverage will be denied and an additional insurance coverage lawsuit may ensue").

In sum, although Goldman has incurred regulatory fines, penalties and disgorgement of approximately $5 billion, the adequacy of 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." *In re Agent Orange Prod. Liab. Litig.*, 597 F. Supp. 740, 762 (E.D.N.Y. 1984), *aff'd*, 818 F.2d 145 (2d Cir. 1987). The Court need only determine whether the Settlement falls within a "range of reasonableness" – a range which "recognizes the uncertainties of law and fact in any particular case and the concomitant risks and costs necessarily inherent in taking any litigation to completion." *Newman v. Stein*, 464 F.2d 689, 693 (2d Cir. 1972). As noted above, Plaintiff submits that, given the extraordinary risks to recovery and the difficulty in attributing any potential damages to alleged breaches of fiduciary duty committed by Goldman's Board, the $79.5 million Monetary Consideration—even before factoring in the valuable corporate governance measures provided in the Settlement—is an excellent result that falls well within the range of reasonableness for derivative actions such as this action, thus strongly supporting preliminary approval of the Settlement.

b. The Proposed Settlement's Governance Reforms Constitute Important Additional Relief That Was Only Achievable Through a Negotiated Resolution

The Proposed Settlement, moreover, pairs its monetary recovery with significant corporate governance reforms. These reforms were designed by Plaintiff with the assistance of an experienced, renowned corporate governance expert, Columbia Law School's Jeffrey N. Gordon, and are tailored to prevent recurrence of similar misconduct in the future.

The corporate governance reforms specifically are directed at enhancing Goldman's compliance program. The DPA's Corporate Compliance Program, which would have expired on

October 22, 2023 but which will be extended for an additional year as part of the Proposed Settlement, requires the Company's directors and senior management to "provide strong, explicit, and visible support and commitment to its corporate policy against violation of the anti-corruption laws and its compliance codes." Ex. A at C-1. The Corporate Compliance Program seeks to deter violations of the FCPA and other applicable anti-corruption laws and to ensure that the Company has a system of financial and accounting procedures, including a system of internal controls, reasonably designed to provide reasonable assurances that transactions are executed and access to assets is permitted only in accordance with management's general or specific authorization. In support of these policies and controls, the Corporate Compliance Program requires Goldman to: (i) implement mechanisms designed to ensure that the Company's anti-corruption compliance code, policies, and procedures are effectively communicated to employees; (ii) maintain, or where necessary, establish an effective system for internal reporting and investigation; (iii) implement mechanisms to enforce its compliance code, policies, and procedures and institute appropriate disciplinary procedures for violations of anti-corruption laws and related Company policies and procedures; and (iv) institute appropriate risk-based due diligence and compliance requirements pertaining to the retention and oversight of all agents and business partners. *Id.*

The Proposed Settlement also requires the Company's CCO to report to the Board, or the Audit Committee of the Board, on a periodic basis, and ensures that the CCO can hire a dedicated internal investigatory staff and external investigators. Stipulation, §B. Furthermore, the Proposed Settlement requires the Company to maintain an anonymous hotline that employees may use to report matters to the CCO, which will be managed by the Company's Compliance Department. *Id.* Finally, the Proposed Settlement requires Goldman to designate an outside party to monitor

public media and industry reports that may raise compliance concerns, with that outside party reporting any such issues to the CCO. *Id.*

Courts widely recognize the substantial benefits conferred upon public corporations and their stockholders through the adoption of corporate governance reforms. *Cf. Pfizer*, 780 F. Supp. 2d at 342 (recognizing reform aspects of settlement "provide considerable corporate benefits … in the form of a significantly improved institutional structure for detecting and rectifying the types of wrongdoing that have … caused extensive harm to the company"); *AOL Time Warner,* 2006 WL 2572114, at *4 (non-monetary benefits alone can be "substantial enough to merit [settlement] approval"); *In re NVIDIA Corp. Deriv. Litig*., 2008 WL 5382544, at *3 (N.D. Cal. Dec. 22, 2008) ("As corporate debacles such as Enron, Tyco, and WorldCom demonstrate, strong corporate governance is fundamental to the economic well-being and success of a corporation."). Moreover, these reforms constitute "a form of relief that [plaintiffs] could not have obtained at trial" and that was, therefore, only achievable through a negotiated resolution. *In re Activision Blizzard, Inc. S'holder Litig.,* 124 A.3d 1025, 1067 (Del. Ch. 2015) (commenting favorably on non-monetary aspects of a shareholder derivative settlement).

3. The Proposed Settlement Provides Goldman with Immediate Relief and Avoids the Risk and Uncertainty of Protracted Litigation

Finally, the derivative nature of this litigation compelled Plaintiff to act in the best interest of Goldman at all times. This required Plaintiff to afford weight to Goldman's interests in avoiding the uncertainty and distraction of further litigation arising from the 1MDB scandal and potential collateral harm that could befall the Company as a result of further adversarial litigation between the parties to this Action. *See Wells Fargo*, 2019 WL 13020734, at *6 (granting preliminary approval for derivative settlement, recognizing that the proposed settlement would benefit the nominal defendant company by avoiding "lingering uncertainty" and facilitating "Wells Fargo's

efforts to move past this series of scandals.") (citing *In re Apple Computer, Inc. Deriv. Litig.*, 2008 WL 4820784, at *2 (N.D. Cal. Nov. 5, 2008)) ("The principal factor to be considered in determining the fairness of a settlement concluding a shareholders' derivative action is the extent of the benefit to be derived from the proposed settlement by the corporation, the real party in interest."). Thus, Plaintiff was motivated to achieve meaningful results for Goldman while at the same time putting the Company in the best possible position to move its business forward.

The Proposed Settlement here provides Goldman with meaningful financial compensation for the harm caused by the 1MDB scandal, implements reforms to deter and prevent the recurrence of misconduct, and provides certainty and finality to the Company, facilitating its efforts to move past the scandal. Plaintiff submits that it is an extraordinary result for the Company and one easily meeting the standards for preliminary approval.

B. Attorney's Fees

At final approval, Plaintiff's counsel will formally request an award of attorneys' fees not to exceed 25% of the Monetary Consideration, to be paid by Goldman to Plaintiff's Counsel (the "Fee Application"). Goldman Sachs and the Individual Defendants have agreed not to object to or otherwise challenge any reasonable attorneys' fee and expense request, so long as Plaintiff or its counsel does not apply to the Court for an award of fees and expenses that exceeds 25% of the Monetary Consideration. Stipulation at §G. The Supreme Court has endorsed this type of consensual resolution of attorneys' fees as the ideal towards which litigations should strive. *See Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983) ("A request for attorneys' fees should not result in a second major litigation. Ideally, of course, litigants will settle the amount of a fee."). Additionally, Plaintiff in this Action intends to apply to the Court for a service award (the "Service Award"), which will reimburse Plaintiff for its time, efforts and expenses in furtherance of the

Action, to be paid out of the Court-awarded attorneys' fees. *See e.g.*, *Capsolas v. Pasta Res. Inc.*, 2012 WL 4760910, at *9 (S.D.N.Y. Oct. 5, 2012) ("The Court finds reasonable service awards of $20,000 for class representative…").

Assuming the Court preliminarily approves the Proposed Settlement, the Fee Application will be fully addressed in connection with briefing on Plaintiff's motion for final approval of the Proposed Settlement. At that time, Plaintiff will submit additional information in support of its requested award, and the Court will have the opportunity to evaluate the reasonableness of the request in full. Plaintiff respectfully submits that, for present purposes, the fee and expense award is well within the range of possible approval. It represents up to 25% of the total monetary recovery achieved by the Proposed Settlement, without even ascribing any quantifiable benefit to the significant governance reforms achieved by the Proposed Settlement. This falls within the range of possible approval in the Second Circuit. Indeed, "District courts in the Second Circuit routinely award attorney's fees that are 30 percent or greater." *Velez v. Novartis Pharms. Corp.,* 2010 WL 4877852, at *21 (S.D.N.Y. Nov. 30, 2010) (collecting cases); *Christine Asia Co., Ltd v. Yun Ma*, 2019 WL 5257534, at **16-18 (S.D.N.Y. Oct. 16, 2019) (awarding 25% of a $250 million settlement fund); *In re BHP Billiton Ltd. Sec. Litig.*, 2019 WL 1577313, at *1 (S.D.N.Y. Apr. 10, 2019) (awarding 30% of $50 million settlement, plus interest).

C. The Proposed Notice is Adequate and Reasonable

Pursuant to Rule 23.1 (c), notice of a proposed settlement of a shareholder derivative action "must be given to shareholders or members in the manner that the court orders." If the Court grants preliminary approval, the Company will notify current Goldman stockholders no later than seven calendar days after the Court grants preliminary approval, by: (a) filing a copy of the Stipulation and the Notice (in the form attached as Exhibit B to the Settlement Stipulation) as an

exhibit to a Form 8-K with the United States Securities and Exchange Commission; (b) posting a copy of the Stipulation and the Notice via a link on the "Investor Relations" page of the Company's corporate website, which documents shall remain posted on the Company's corporate website through the Effective Date of the Settlement (i.e. the date the Court enters a Final Judgment and Order of Dismissal in the Action); and (c) publishing a Summary Notice (in the form attached as Exhibit C to the Settlement Stipulation) in the *Wall Street Journal* and *New York Times* and via a national wire service. The Company will assume administrative responsibility for and will pay any and all costs and expenses related to disseminating the Notice. Additionally, Plaintiff's Counsel will post the Settlement Stipulation and the Notice on the firm's website.

The proposed Notice will advise the Company's stockholders of the essential terms of the Proposed Settlement, and of information regarding Plaintiff's Counsel's Fee Application. It also will set forth the procedure for objecting to the Proposed Settlement and/or the Attorney's Fees, and will provide specifics on the date, time and place of the Settlement Hearing, thereby satisfying the requirements of Rule 23.1. The same type of notice program proposed here has been approved by other courts in this District and throughout the country as fully satisfying the requirements of Rule 23.1 and the requirements of due process.[5]

[5] The use of website posting coupled with other publication has gained broad acceptance in light of the investment community's transition from a paper-based to a web-based disclosure system. *See* "Use of Electronic Media for Delivery Purposes, "SEC Release No. 33-7233, 60 Fed. Reg. 53458, 53459 (Oct. 6, 1996) ("The Commission believes that the use of electronic media should be at least an equal alternative to the use of paper-based media."). *See In re Aclaris Therapeutics, Inc. Deriv. Litig.,* No. 1:19-cv-1064-LJL (S.D.N.Y.), Aug. 18, 2021 Preliminary Approval Order, Dkt. No. 27 at 3; Dkt. No. 24 at 16 (approving notice program to shareholders consisting of a wire service press release; filing of the notice and settlement agreement in a Form 8-k with the SEC; and posting the notice and settlement agreement on the company's website), attached as Exhibit C hereto; *Employees Retirement System of the City of St. Louis v. Jones, et al.,* No. 2:20-cv-4813 (S.D. Ohio), Order of Preliminary Settlement Approval, May 9, 2022, Dkt. No. 176 at ¶5-6 (approving similar notice program), attached as Exhibit D hereto; *Wells Fargo,* 2019 WL 13020734, at *9 (providing for similar notice program).

V. PROPOSED SCHEDULE FOR DISSEMINATION OF NOTICE AND SCHEDULE OF FINAL APPROVAL HEARING

Pursuant to the proposed Preliminary Approval Order, the Parties propose the following schedule of events leading to the Settlement Hearing:

Event	Date
Filing of Notice via Form 8-K with the SEC (Preliminary Approval Order ¶7(i))	Within 7 calendar days after entry of the Preliminary Approval Order
Posting of Notice on Goldman Sachs' website and Plaintiff's Counsel's website (Preliminary Approval Order ¶7(i))	Within 7 calendar days after entry of the Preliminary Approval Order
Last day for counsel for Goldman Sachs and counsel for Plaintiff to file appropriate proof of compliance with respect to dissemination of Notice (Preliminary Approval Order ¶7(iv))	At least 5 calendar days prior to the Settlement Hearing
Filing of all papers in support of the Settlement, including the Fee Application (Preliminary Approval Order ¶11)	At least 35 calendar days prior to the Settlement Hearing
Last day for Current Goldman Sachs Stockholders to object to the Settlement (Preliminary Approval Order ¶12)	At least 21 calendar days prior to the Settlement Hearing
Filing of all reply papers in support of the Settlement, including responses to objections, if any (Preliminary Approval Order ¶13)	At least 7 calendar days prior to the Settlement Hearing
Final Approval Hearing (Preliminary Approval Order, ¶4)	At least 65 days after entry of the Preliminary Approval Order

VI. CONCLUSION

For all of the foregoing reasons, Plaintiff respectfully requests that this Court grant preliminary approval of the Settlement, approve and direct the implementation of the notice plan, and schedule a Settlement Hearing.

Dated: May 13, 2022

Respectfully submitted,

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Counsel for Plaintiff Fulton County Employees' Retirement System

CERTIFICATE OF SERVICE

I hereby certify that on May 13, 2022, I caused to be filed a true and correct copy of the foregoing with the Clerk of Court via CM/ECF. Notice of this filing will be sent electronically to all registered parties by operation of the Court's electronic filing system.

/s/ Steven B. Singer
Steven B. Singer

EXHIBIT A

ATTACHMENT C

CORPORATE COMPLIANCE PROGRAM

In order to address any deficiencies in its internal controls, compliance code, policies, and procedures regarding compliance with the Foreign Corrupt Practices Act ("FCPA"), 15 U.S.C. §§ 78dd-1, *et seq.,* and other applicable anti-corruption laws, The Goldman Sachs Group, Inc. (the "Company") agrees to continue to conduct, in a manner consistent with all of its obligations under this Agreement, appropriate reviews of its existing internal controls, policies, and procedures.

Where necessary and appropriate, the Company agrees to adopt new, or to modify or maintain its existing compliance programs, including internal controls, compliance policies, and procedures in order to ensure that it maintains: (a) an effective system of internal accounting controls designed to ensure the making and keeping of fair and accurate books, records, and accounts; and (b) a rigorous anti-corruption compliance program that incorporates relevant internal accounting controls, as well as policies and procedures designed to effectively detect and deter violations of the FCPA and other applicable anti-corruption laws. At a minimum, this should include, but not be limited to, the following elements to the extent they are not already part of the Company's existing internal controls, compliance code, policies, and procedures:

Commitment to Compliance

1. The Company will ensure that its directors and senior management provide strong, explicit, and visible support and commitment to its corporate policy against violations of the anti-corruption laws and its compliance codes, and demonstrate rigorous adherence by example. The Company will also ensure that middle management, in turn, reinforce those standards and

encourage employees to abide by them. The Company will create and foster a culture of ethics and compliance with the law in its day-to-day operations at all levels of the company.

Policies and Procedures

2. The Company will develop and promulgate a clearly articulated and visible corporate policy against violations of the FCPA and other applicable foreign law counterparts (collectively, the "anti-corruption laws"), which policy shall be memorialized in a written compliance code or codes.

3. The Company will develop and promulgate compliance policies and procedures designed to reduce the prospect of violations of the anti-corruption laws and the Company's compliance code, and the Company will take appropriate measures to encourage and support the observance of ethics and compliance policies and procedures against violation of the anti-corruption laws by personnel at all levels of the Company. These anti-corruption policies and procedures shall apply to all directors, officers, and employees and, where necessary and appropriate, outside parties acting on behalf of the Company in a foreign jurisdiction, including, but not limited to, agents and intermediaries, consultants, representatives, distributors, teaming partners, contractors and suppliers, consortia, and joint venture partners (collectively, "agents and business partners"). The Company shall notify all employees that compliance with the policies and procedures is the duty of individuals at all levels of the company. Such policies and procedures shall address:

a. gifts;

b. hospitality, entertainment, and expenses;

c. customer travel;

d. political contributions;

e. charitable donations and sponsorships;

f. facilitation payments; and

g. solicitation and extortion.

4. The Company will ensure that it has a system of financial and accounting procedures, including a system of internal controls, reasonably designed to ensure the maintenance of fair and accurate books, records, and accounts. This system shall be designed to provide reasonable assurances that:

a. transactions are executed in accordance with management's general or specific authorization;

b. transactions are recorded as necessary to permit preparation of financial statements in conformity with generally accepted accounting principles or any other criteria applicable to such statements, and to maintain accountability for assets;

c. access to assets is permitted only in accordance with management's general or specific authorization; and

d. the recorded accountability for assets is compared with the existing assets at reasonable intervals and appropriate action is taken with respect to any differences.

Periodic Risk-Based Review

5. The Company will develop these compliance policies and procedures on the basis of a periodic risk assessment addressing the individual circumstances of the Company, in particular the foreign bribery risks facing the Company, including, but not limited to, its geographical organization, interactions with various types and levels of government officials, industrial sectors

of operation, potential clients and business partners, use of third parties, gifts, travel and entertainment expenses, charitable and political donations, involvement in joint venture arrangements, importance of licenses and permits in the Company's operations, degree of governmental oversight and inspection, and volume and importance of goods and personnel clearing through customs and immigration.

6. The Company shall review its anti-corruption compliance policies and procedures no less than annually and update them as appropriate to ensure their continued effectiveness, taking into account relevant developments in the field and evolving international and industry standards.

Proper Oversight and Independence

7. The Company will assign responsibility to one or more senior corporate executives of the Company for the implementation and oversight of the Company's anti-corruption compliance code, policies, and procedures. Such corporate official(s) shall have the authority to report directly to independent monitoring bodies, including internal audit, the Company's Board of Directors, or any appropriate committee of the Board of Directors, and shall have an adequate level of stature and autonomy from management as well as sufficient resources and authority to maintain such autonomy.

Training and Guidance

8. The Company will implement mechanisms designed to ensure that its anti-corruption compliance code, policies, and procedures are effectively communicated to all directors, officers, employees, and, where necessary and appropriate, agents and business partners. These mechanisms shall include: (a) periodic training for all directors and officers, all employees in positions of leadership or trust, positions that require such training (e.g., internal audit, sales,

legal, compliance, finance), or positions that otherwise pose a corruption risk to the Company, and, where necessary and appropriate, agents and business partners; and (b) corresponding certifications by all such directors, officers, employees, agents, and business partners, certifying compliance with the training requirements. The Company will conduct training in a manner tailored to the audience's size, sophistication, or subject matter expertise and, where appropriate, will discuss prior compliance incidents.

9. The Company will maintain, or where necessary establish, an effective system for providing guidance and advice to directors, officers, employees, and, where necessary and appropriate, agents and business partners, on complying with the Company's anti-corruption compliance code, policies, and procedures, including when they need advice on an urgent basis or in any foreign jurisdiction in which the Company operates.

Internal Reporting and Investigation

10. The Company will maintain, or where necessary establish, an effective system for internal and, where possible, confidential reporting by, and protection of, directors, officers, employees, and, where appropriate, agents and business partners concerning violations of the anti-corruption laws or the Company's anti-corruption compliance code, policies, and procedures.

11. The Company will maintain, or where necessary establish, an effective and reliable process with sufficient resources for responding to, investigating, and documenting allegations of violations of the anti-corruption laws or the Company's anti-corruption compliance code, policies, and procedures. The Company will handle the investigations of such complaints in an effective manner, including routing the complaints to proper personnel, conducting timely and thorough investigations, and following up with appropriate discipline where necessary.

Enforcement and Discipline

12. The Company will implement mechanisms designed to effectively enforce its compliance code, policies, and procedures, including appropriately incentivizing compliance and disciplining violations.

13. The Company will institute appropriate disciplinary procedures to address, among other things, violations of the anti-corruption laws and the Company's anti-corruption compliance code, policies, and procedures by the Company's directors, officers, and employees. Such procedures should be applied consistently, fairly and in a manner commensurate with the violation, regardless of the position held by, or perceived importance of, the director, officer, or employee. The Company shall implement procedures to ensure that where misconduct is discovered, reasonable steps are taken to remedy the harm resulting from such misconduct, and to ensure that appropriate steps are taken to prevent further similar misconduct, including assessing the internal controls, compliance code, policies, and procedures and making modifications necessary to ensure the overall anti-corruption compliance program is effective.

Third-Party Relationships

14. The Company will institute appropriate risk-based due diligence and compliance requirements pertaining to the retention and oversight of all agents and business partners, including:

a. properly documented due diligence pertaining to the hiring and appropriate and regular oversight of agents and business partners;

b. informing agents and business partners of the Company's commitment to abiding by anti-corruption laws, and of the Company's anti-corruption compliance code, policies, and procedures; and

c. seeking a reciprocal commitment from agents and business partners. The Company will understand and record the business rationale for using a third party in a transaction, and will conduct adequate due diligence with respect to the risks posed by a third-party partner such as a third-party partner's reputations and relationships, if any, with foreign officials. The Company will ensure that contract terms with third parties specifically describe the services to be performed, that the third party is actually performing the described work, and that its compensation is commensurate with the work being provided in that industry and geographical region. The Company will engage in ongoing monitoring of third-party relationships through updated due diligence, training, audits, and/or annual compliance certifications by the third party.

15. Where necessary and appropriate, the Company will include standard provisions in agreements, contracts, and renewals thereof with all agents and business partners that are reasonably calculated to prevent violations of the anti-corruption laws, which may, depending upon the circumstances, include: (a) anti-corruption representations and undertakings relating to compliance with the anti-corruption laws; (b) rights to conduct audits of the books, records, and accounts of the agent or business partner to ensure compliance with the foregoing; and (c) rights to terminate an agent or business partner as a result of any breach of the anti-corruption laws, the Company's compliance code, policies, or procedures, or the representations and undertakings related to such matters.

Mergers and Acquisitions

16. The Company will develop and implement policies and procedures for mergers and acquisitions requiring that the Company conduct appropriate risk-based due diligence on potential new business entities, including appropriate FCPA and anti-corruption due diligence by legal, accounting, and compliance personnel.

17. The Company will ensure that the Company's compliance code, policies, and procedures regarding the anti-corruption laws apply as quickly as is practicable to newly acquired businesses or entities merged with the Company and will promptly:

a. train the directors, officers, employees, agents, and business partners consistent with Paragraph 8 above on the anti-corruption laws and the Company's compliance code, policies, and procedures regarding anti-corruption laws; and

b. where warranted, conduct an FCPA-specific audit of all newly acquired or merged businesses as quickly as practicable.

Monitoring, Testing, and Remediation

18. In order to ensure that its compliance program does not become stale, the Company will conduct periodic reviews and testing of its anti-corruption compliance codes, policies, and procedures designed to evaluate and improve their effectiveness in preventing and detecting violations of anti-corruption laws and the Company's anti-corruption codes, policies, and procedures, taking into account relevant developments in the field and evolving international and industry standards. Company will ensure that compliance and control personnel have sufficient direct or indirect access to relevant sources of data to allow for timely and effective monitoring and/or testing of transactions. Based on such review and testing and its analysis of

any prior misconduct, the Company will conduct a thoughtful root cause analysis and timely and appropriately remediate to address the root causes.

EXHIBIT B

UNITED STATES SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

Form 10-K

ANNUAL REPORT PURSUANT TO SECTION 13 OR 15(d) OF
THE SECURITIES EXCHANGE ACT OF 1934

For the fiscal year ended December 31, 2021 **Commission File Number: 001-14965**

The Goldman Sachs Group, Inc.

(Exact name of registrant as specified in its charter)

Delaware	13-4019460
(State or other jurisdiction of incorporation or organization)	(I.R.S. Employer Identification No.)
200 West Street, New York, N.Y.	10282
(Address of principal executive offices)	(Zip Code)

(212) 902-1000
(Registrant's telephone number, including area code)

Securities registered pursuant to Section 12(b) of the Act:

Title of each class	Trading Symbol	Exchange on which registered
Common stock, par value $.01 per share	GS	NYSE
Depositary Shares, Each Representing 1/1,000th Interest in a Share of Floating Rate Non-Cumulative Preferred Stock, Series A	GS PrA	NYSE
Depositary Shares, Each Representing 1/1,000th Interest in a Share of Floating Rate Non-Cumulative Preferred Stock, Series C	GS PrC	NYSE
Depositary Shares, Each Representing 1/1,000th Interest in a Share of Floating Rate Non-Cumulative Preferred Stock, Series D	GS PrD	NYSE
Depositary Shares, Each Representing 1/1,000th Interest in a Share of 5.50% Fixed-to-Floating Rate Non-Cumulative Preferred Stock, Series J	GS PrJ	NYSE
Depositary Shares, Each Representing 1/1,000th Interest in a Share of 6.375% Fixed-to-Floating Rate Non-Cumulative Preferred Stock, Series K	GS PrK	NYSE
5.793% Fixed-to-Floating Rate Normal Automatic Preferred Enhanced Capital Securities of Goldman Sachs Capital II	GS/43PE	NYSE
Floating Rate Normal Automatic Preferred Enhanced Capital Securities of Goldman Sachs Capital III	GS/43PF	NYSE
Medium-Term Notes, Series F, Callable Fixed and Floating Rate Notes due 2031 of GS Finance Corp.	GS/31B	NYSE

Securities registered pursuant to Section 12(g) of the Act: None

Indicate by check mark if the registrant is a well-known seasoned issuer, as defined in Rule 405 of the Securities Act. ☐ Yes ☒ No

Indicate by check mark if the registrant is not required to file reports pursuant to Section 13 or 15(d) of the Act. ☐ Yes ☒ No

Indicate by check mark whether the registrant (1) has filed all reports required to be filed by Section 13 or 15(d) of the Securities Exchange Act of 1934 during the preceding 12 months (or for such shorter period that the registrant was required to file such reports), and (2) has been subject to such filing requirements for the past 90 days. ☒ Yes ☐ No

Indicate by check mark whether the registrant has submitted electronically every Interactive Data File required to be submitted pursuant to Rule 405 of Regulation S-T (§ 232.405 of this chapter) during the preceding 12 months (or for such shorter period that the registrant was required to submit such files). ☒ Yes ☐ No

Indicate by check mark whether the registrant is a large accelerated filer, an accelerated filer, a non-accelerated filer, a smaller reporting company, or an emerging growth company. See the definitions of "large accelerated filer," "accelerated filer," "smaller reporting company," and "emerging growth company" in Rule 12b-2 of the Exchange Act.

Large accelerated filer ☒	Accelerated filer ☐	Non-accelerated filer ☐
Smaller reporting company ☐		Emerging growth company ☐

If an emerging growth company, indicate by check mark if the registrant has elected not to use the extended transition period for complying with any new or revised financial accounting standards provided pursuant to Section 13(a) of the Exchange Act. ☐

Indicate by check mark whether the registrant has filed a report on and attestation to its management's assessment of the effectiveness of its internal control over financial reporting under Section 404(b) of the Sarbanes-Oxley Act (15 U.S.C. 7262(b)) by the registered public accounting firm that prepared or issued its audit report. ☒

Indicate by check mark whether the registrant is a shell company (as defined in Rule 12b-2 of the Exchange Act). ☐ Yes ☒ No

As of June 30, 2021, the aggregate market value of the common stock of the registrant held by non-affiliates of the registrant was approximately $127.4 billion.

As of February 11, 2022, there were 337,922,970 shares of the registrant's common stock outstanding.

Documents incorporated by reference: Portions of The Goldman Sachs Group, Inc.'s Proxy Statement for its 2022 Annual Meeting of Shareholders are incorporated by reference in the Annual Report on Form 10-K in response to Part III, Items 10, 11, 12, 13 and 14.

Table of Contents

1MDB-Related Matters

Between 2012 and 2013, subsidiaries of the firm acted as arrangers or purchasers of approximately $6.5 billion of debt securities of 1MDB.

On November 1, 2018, the U.S. Department of Justice (DOJ) unsealed a criminal information and guilty plea by Tim Leissner, a former participating managing director of the firm, and an indictment against Ng Chong Hwa, a former managing director of the firm. On August 28, 2018, Leissner was adjudicated guilty by the U.S. District Court for the Eastern District of New York of conspiring to launder money and to violate the U.S. Foreign Corrupt Practices Act's (FCPA) anti-bribery and internal accounting controls provisions. Ng was charged with conspiring to launder money and to violate the FCPA's anti-bribery and internal accounting controls provisions. On May 6, 2019, Ng pleaded not guilty to the DOJ's criminal charges, and trial commenced on February 7, 2022.

On August 18, 2020, the firm announced that it entered into a settlement agreement with the Government of Malaysia to resolve the criminal and regulatory proceedings in Malaysia involving the firm, which includes a guarantee that the Government of Malaysia receives at least $1.4 billion in assets and proceeds from assets seized by governmental authorities around the world related to 1MDB. See Note 18 for further information about this guarantee.

On October 22, 2020, the firm announced that it reached settlements of governmental and regulatory investigations relating to 1MDB with the DOJ, the SEC, the FRB, the NYDFS, the FCA, the PRA, the Singapore Attorney General's Chambers, the Singapore Commercial Affairs Department, the Monetary Authority of Singapore and the Hong Kong Securities and Futures Commission. Group Inc. entered into a three-year deferred prosecution agreement with the DOJ, in which a charge against the firm, one count of conspiracy to violate the FCPA, was filed and will later be dismissed if the firm abides by the terms of the agreement. In addition, GS Malaysia pleaded guilty to one count of conspiracy to violate the FCPA, and was sentenced on June 9, 2021. In May 2021, the U.S. Department of Labor granted the firm a five-year exemption to maintain its status as a qualified professional asset manager (QPAM).

The firm has received multiple demands, beginning in November 2018, from alleged shareholders under Section 220 of the Delaware General Corporation Law for books and records relating to, among other things, the firm's involvement with 1MDB and the firm's compliance procedures. On December 13, 2019, an alleged shareholder filed a lawsuit in the Court of Chancery of the State of Delaware seeking books and records relating to, among other things, the firm's involvement with 1MDB and the firm's compliance procedures. The lawsuit was dismissed without prejudice on August 4, 2021.

On February 19, 2019, a purported shareholder derivative action relating to 1MDB was filed in the U.S. District Court for the Southern District of New York against Group Inc. and the directors at the time and a former chairman and chief executive officer of the firm. The second amended complaint filed on November 13, 2020, alleges breaches of fiduciary duties, including in connection with alleged insider trading by certain current and former directors, unjust enrichment and violations of the anti-fraud provisions of the Exchange Act, including in connection with Group Inc.'s common stock repurchases and solicitation of proxies, and seeks unspecified damages, disgorgement and injunctive relief. Defendants moved to dismiss this action on January 15, 2021. On February 3, 2022, the parties reached a settlement in principle, subject to final documentation and court approval, to resolve this action.

Beginning in March 2019, the firm has also received demands from three shareholders to investigate and pursue claims against certain current and former directors and executive officers based on their oversight and public disclosures regarding 1MDB and related internal controls. In June 2019, the Board appointed a Special Committee to consider the demands and, in January 2021, the Board voted to reject them. In June 2021, the firm reached a settlement with the three shareholders. Following the Board's decision to reject the initial three demands, the firm received two additional demands from alleged shareholders (one of which is the alleged shareholder that filed the December 2019 books and records action in Delaware Chancery Court) to investigate and pursue claims related to 1MDB (and, for one of the demands, other matters) against other parties, including certain current and former directors and executive officers of the firm. In December 2021, the Board voted to reject the two additional demands.

EXHIBIT C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE ACLARIS THERAPEUTICS, INC. DERIVATIVE LITIGATION	Lead Case No. 1:19-cv-10641-LJL

~~[PROPOSED]~~ **PRELIMINARY APPROVAL ORDER**

This matter came before the Court for a hearing on August 17, 2021. Derivative Plaintiffs[1] have made an unopposed motion, pursuant to Rule 23.1 of the Federal Rules of Civil Procedure, for an order: (i) preliminarily approving the proposed settlement ("Settlement") of stockholder derivative claims brought on behalf of Aclaris , in accordance with the Stipulation and Agreement of Settlement dated July 29, 2021 (the "Stipulation"); (ii) approving the form and manner of the notice of the Settlement; and (iii) setting a date for the Settlement Hearing.[2]

WHEREAS, the Stipulation sets forth the terms and conditions for the Settlement, including, but not limited to a proposed Settlement and dismissal with prejudice of the above-captioned stockholder derivative action brought on behalf of Aclaris ("Derivative Action"), and resolution of Celeste Piper's factually-related document inspection demand brought pursuant to title 8, section 220 of the Delaware General Corporation Law Code (the "Inspection Demand");

WHEREAS, the Court having: (i) read and considered Plaintiffs' Unopposed Motion for Preliminary Approval of Stockholder Derivative Settlement together with the accompanying

[1] "Derivative Plaintiffs" refers to plaintiffs Keith Allred and Bruce Brown in the above-captioned consolidated stockholder derivative action. Derivative Plaintiffs, together with Celeste Piper (who has a pending inspection demand with Aclaris Therapeutics, Inc. ("Aclaris" or the "Company")), are collectively referred to as "Plaintiffs."

[2] Except as otherwise expressly provided below or as the context otherwise requires, all capitalized terms contained herein shall have the same meanings and/or definitions as set forth in the Stipulation.

Memorandum of Points and Authorities; (ii) read and considered the Stipulation, as well as all the exhibits attached thereto; and (iii) heard and considered arguments by counsel for the Settling Parties in favor of preliminary approval of the Settlement;

WHEREAS, the Court finds, upon a preliminary evaluation, that the proposed Settlement falls within the range of possible approval criteria, as it provides a beneficial result for Aclaris and appears to be the product of serious, informed, non-collusive negotiations overseen by an experienced mediator; and

WHEREAS, the Court also finds, upon a preliminary evaluation, that Aclaris stockholders should be apprised of the Settlement through the proposed form and means of notice, allowed to file objections, if any, thereto, and appear at the Settlement Hearing.

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED AS FOLLOWS:

1. This Court, for purposes of this order ("Preliminary Approval Order"), adopts the definitions set forth in the Stipulation.

2. This Court preliminarily approves, subject to further consideration at the Settlement Hearing described below, the Settlement as set forth in the Stipulation as being fair, reasonable, and adequate.

3. A hearing shall be held on November 30, 2021 at 11 a.m., before the Honorable Lewis J. Liman, at the U.S. District Court for the Southern District of New York, 500 Pearl Street, New York, New York 10007 (the "Settlement Hearing"), at which the Court will determine: (i) whether the terms of the Stipulation should be approved as fair, reasonable, and adequate; (ii) whether the form of the notice of the Settlement and means of dissemination of the notice of the Settlement fully satisfied the requirements of Rule 23.1 of the Federal Rules of Civil

Procedure and the requirements of due process; (iii) whether all Released Claims against the Released Persons should be fully and finally released; (iv) whether the agreed-to Fee and Expense Amount as well as the Service Awards should be approved; and (v) such other matters as the Court may deem appropriate.

4. The Court finds that the form, substance, and dissemination of information regarding the proposed Settlement in the manner set out in this Preliminary Approval Order constitutes the best notice practicable under the circumstances and complies fully with Rule 23.1 of the Federal Rules of Civil Procedure and due process.

5. Within ten (10) calendar days after the entry of this Preliminary Approval Order, Aclaris shall: (i) issue the Notice of Pendency and Proposed Settlement of Stockholder Derivative Action ("Notice") via a press release on GlobeNewswire or PR Newswire; (ii) file with the U.S. Securities and Exchange Commission ("SEC") the Notice and Stipulation as exhibits to a Form 8-K; and (iii) post the Notice and the Stipulation on the Investor Overview page of Aclaris' corporate website. The Notice will contain a link to the page of Aclaris' corporate website where the Notice and Stipulation will be posted, which posting will be maintained through the date of the Settlement Hearing.

6. All costs incurred in the publication, filing and posting of the notice of the Settlement shall be paid by Aclaris, and Aclaris shall undertake all administrative responsibility for the publication, filing and posting of the notice of the Settlement.

7. At least twenty-one (21) calendar days prior to the Settlement Hearing, Defendants' Counsel shall file with the Court an appropriate affidavit or declaration with respect to filing, publishing, and posting the notice of the Settlement as provided for in paragraph 5 of this Preliminary Approval Order.

8. All Current Aclaris Stockholders shall be subject to and bound by the provisions of the Stipulation and the releases contained therein, and by all orders, determinations, and judgments in the Derivative Action concerning the Settlement, whether favorable or unfavorable to Current Aclaris Stockholders.

9. Neither the Stipulation nor the Settlement, including any Exhibits attached thereto, nor any act performed or document executed pursuant to or in furtherance of the Stipulation or the Settlement: (a) is or may be deemed to be offered, attempted to be offered or used in any way as a concession, admission or evidence of the validity of any Released Claims, or of any fault, wrongdoing or liability of the Released Persons or Aclaris; or (b) is or may be deemed to be or may be used as a presumption, admission, or evidence of any liability, fault or omission of any of the Released Persons or Aclaris in any civil, criminal, administrative, or other proceeding in any court, administrative agency, tribunal, or other forum. Neither this Stipulation nor the Settlement shall be admissible in any proceeding for any purpose, except to enforce the terms of the Settlement, and except that the Released Persons may file or use the Stipulation, the Court approval order, and/or the Judgement in any action that may be brought against them in order to support a defense or counterclaim based on principles of *res judicata*, collateral estoppel, full faith and credit, release, good faith settlement, standing, judgment bar or reduction, or any other theory of claim preclusion or issue preclusion or similar defense or counterclaim.

10. Pending final determination of whether the Settlement should be approved, Plaintiffs and Current Aclaris Stockholders shall not commence or prosecute against any of the Released Persons any action or proceeding in any court or tribunal asserting any of the Released Claims.

11. Any stockholder of Aclaris common stock may appear and show cause, if he, she, or it has any reason why the Settlement embodied in the Stipulation should not be approved as fair, reasonable, and adequate, or why a judgment should or should not be entered hereon, or the Fee and Expense Amount or Service Awards should not be awarded. However, no Aclaris stockholder shall be heard or entitled to contest the approval of the proposed Settlement, or, if approved, the Judgment to be entered hereon, unless that Aclaris stockholder has caused to be filed, and served on counsel as noted below, written objections stating all supporting bases and reasons for the objection, and setting forth proof, including documentary evidence, of current ownership of Aclaris stock and ownership of Aclaris stock as of July 29, 2021, and setting forth the identities of any cases, by name, court, and docket number, in which the objector or his, or, or its attorney has objected to a settlement in the last three years.

12. At least fourteen (14) calendar days prior to the Settlement Hearing set for November 30, 2021, any such person must file the written objection(s) and corresponding materials with the Clerk of the Court, U.S. District Court for the Southern District of New York, 500 Pearl Street, New York, New York 10007 and serve such materials by that date, to each of the following Settling Parties' counsel:

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13. Only stockholders who have filed with the Court and sent to the Settling Parties' counsel valid and timely written notices of objection will be entitled to be heard at the hearing unless the Court orders otherwise.

14. Any Person or entity who fails to appear or object in the manner provided herein shall be deemed to have waived such objection and shall forever be foreclosed from making any objection to the fairness, reasonableness, or adequacy of the Settlement and to the Fee and Expense Amount and Service Awards, unless otherwise ordered by the Court, but shall be forever bound by the Judgment to be entered and the releases to be given as set forth in the Stipulation.

15. Plaintiffs shall file their motion for final approval of the Settlement at least twenty-one (21) calendar days prior to the Settlement Hearing. If there is any objection to the Settlement, Plaintiffs shall file a response to the objection(s) at least seven (7) calendar days prior to the Settlement Hearing.

16. All proceedings in this Derivative Action are stayed until further order of the Court, except as may be necessary to implement the Settlement or comply with the terms of this Stipulation.

17. This Court may, for good cause, extend any of the deadlines set forth in this Preliminary Approval Order without further notice to stockholders.

18. Neither the Stipulation nor the Settlement, nor any act performed or document executed pursuant to or in furtherance of the Stipulation or the Settlement: (i) is or may be deemed to be or may be offered, attempted to be offered or used in any way by the Settling Parties or any other Person as a presumption, a concession or an admission of, or evidence of, any fault, wrongdoing or liability of the Settling Parties or Released Persons, or of the validity of any Released Claims; or (ii) is intended by the Settling Parties to be offered or received as evidence or used by any other person in any other actions or proceedings, whether civil, criminal, or administrative, other than to enforce the terms therein.

19. The Court reserves: (i) the right to approve the Settlement, with such modifications as may be agreed to by counsel for the Settling Parties consistent with such Settlement, without further notice to Aclaris stockholders; (ii) the right to continue or adjourn the Settlement Hearing from time to time or by oral announcement at the hearing or at any adjournment thereof, without further notice to Aclaris stockholders; (iii) and the right to hold the Settlement Hearing telephonically or by videoconference without further notice to Aclaris stockholders. Any Aclaris stockholder (or his, her or its counsel) who wishes to appear at the Settlement Hearing should consult the Court's calendar and/or the Investor Overview page of Aclaris' corporate website for any change in date, time or format of the Settlement Hearing. The Court retains jurisdiction to consider all further applications arising out of or connected with the Settlement.

IT IS SO ORDERED.

DATED: 8/18/2021

HONORABLE LEWIS J. LIMAN
U.S. DISTRICT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE ACLARIS THERAPEUTICS, INC. DERIVATIVE LITIGATION	Lead Case No. 1:19-cv-10641-LJL

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

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Plaintiffs Keith Allred ("Allred") and Bruce Brown ("Brown") (together, the "Derivative Plaintiffs") in the above-captioned consolidated shareholder derivative action (the "Derivative Action") respectfully submit this Memorandum of Law in support of Plaintiffs' Unopposed Motion for Preliminary Approval of Settlement (the "Motion").[1]

I. INTRODUCTION

Derivative Plaintiffs' claims brought on behalf of Aclaris Therapeutics, Inc. ("Aclaris" or the "Company") arise from allegations of breaches of fiduciary duties, unjust enrichment, abuse of control, gross mismanagement, waste of corporate assets, and for violations of Section 14(a) of the Securities Exchange Act of 1934 (the "Exchange Act"), discussed more fully below. On June 4, 2021, after extensive, arm's-length negotiations overseen by a nationally reputed mediator, Jed D. Melnick, Esq. of JAMS (the "Mediator"), the Settling Parties reached a Settlement in the Derivative Action resolving Derivative Plaintiffs' claims. The Settlement also resolves the related claims of Celeste Piper (the "Stockholder," together with the Derivative Plaintiffs, "Plaintiffs").[2] As a result, the Derivative Plaintiffs now seek an order from the Court: (1) preliminarily approving the terms and conditions of the Settlement as set forth in the Stipulation; (2) directing that notice of the Settlement be provided to Current Aclaris Stockholders; and (3) scheduling a Settlement Hearing to consider whether the Settlement and Fee and Expense Amount and Service Awards should be finally approved.

The Settlement provides a substantial benefit to Aclaris, on behalf of which the

[1] Unless otherwise defined herein, all capitalized terms have the same meaning as those set forth in the Stipulation and Agreement of Settlement dated July 29, 2021 (the "Stipulation") attached as Exhibit 1 to the Declaration of Timothy Brown in support of the Motion.

[2] The Stockholder, who served a document inspection demand pursuant to title 8, section 220 of the Delaware General Corporation Law Code on Aclaris ("Inspection Demand") and participated in the settlement process leading to the executed Stipulation, joins in Derivative Plaintiffs' Motion.

Derivative Action was brought. Pursuant to the terms of the Settlement, Aclaris' Board of Directors (the "Board") has agreed to implement, for a period of no less than three (3) years, corporate governance reforms designed to strengthen internal controls, improve compliance policies and reporting procedures, and enhance the Board's oversight of the Company's research and development activities (collectively, the "Corporate Governance Reforms"). Aclaris and its Board acknowledge and agree that the Corporate Governance Reforms confer substantial benefits on the Company and its stockholders, and Aclaris acknowledges and agrees that the filing, pendency, and settlement of the Derivative Action and the Inspection Demand were the cause of the Company's decision to adopt, implement, and maintain the Corporate Governance Reforms.

Only after the Corporate Governance Reforms were agreed to in principle did negotiations concerning the amount of attorneys' fees and expenses to be paid to Plaintiffs' Counsel commence. In consideration of the substantial benefits conferred upon Aclaris as a direct result of the Corporate Governance Reforms and Plaintiffs' and Plaintiffs' Counsel's efforts in connection with the Derivative Action and Inspection Demand, the Individual Defendants agreed to cause their insurer to pay Plaintiffs' Counsel $425,000 (the "Fee and Expense Amount") for their attorneys' fees and expenses.

At the preliminary approval stage, the Court need only conclude that the proposed Settlement is within the range of resolutions that might ultimately be found to be fair, reasonable, and adequate, such that notice of the Settlement should be provided to Current Aclaris Stockholders, and that the Settlement Hearing should be scheduled.

Derivative Plaintiffs respectfully submit that the Settlement easily meets this standard and that the Court should, therefore, preliminarily approve the Settlement and enter the proposed

Preliminary Approval Order that preliminarily approves the Settlement, authorizes the form and manner of providing notice of the Settlement to Current Aclaris Stockholders, and sets a date for the Settlement Hearing, substantially in the form of Exhibit B to the Stipulation.

Defendants do not oppose the Motion or any of the requested relief.

II. BACKGROUND OF THE DERIVATIVE ACTION AND SETTLEMENT NEGOTIATIONS

A. Factual Background

Aclaris is a biopharmaceutical company that primarily specializes in developing solutions using small molecule technology to bridge treatment gaps in immuno-inflammatory diseases.

Plaintiffs allege that, as early as May 8, 2018 and at least through June 20, 2019, the Individual Defendants issued and/or caused the Company to issue false and misleading statements and omissions in connection with the risks, efficacy, and side effects of Aclaris' then-product, ESKATA™ for the treatment of seborrheic keratosis, and failing to ensure the Company maintained adequate internal controls. Defendants deny Plaintiffs' allegations. Stipulation, § I.

B. Procedural History

On November 15, 2019, plaintiff Allred filed a Verified Shareholder Derivative Complaint on behalf of Aclaris against the Individual Defendants, captioned *Allred v. Walker, et al.*, Case No. 1:19-cv-10641-LJL (S.D.N.Y.), asserting claims for breaches of fiduciary duties, unjust enrichment, abuse of control, gross mismanagement, waste of corporate assets, and for violations of Section 14(a) of the Exchange Act (the "*Allred* Action") (D.I. 1).

On November 25, 2019, Plaintiff Brown filed his own Verified Shareholder Derivative Complaint on behalf of Aclaris against the Individual Defendants, captioned *Brown v. Walker, et al.*, Case No. 1:19-cv-10876-LJL (S.D.N.Y), asserting the same claims against the same Individual Defendants as in the *Allred* Action (the "*Brown* Action") (*Brown* Action, D.I. 1).

On December 11, 2019, Derivative Plaintiffs and Defendants stipulated to consolidate the *Allred* Action and the *Brown* Action (together, the "Derivative Action"). The Court so ordered the consolidation the next day, on December 12, 2019. (D.I. 8, 9).

On January 10, 2020, Derivative Plaintiffs and Defendants stipulated to stay the proceedings in the Derivative Action until the resolution of a motion to dismiss in a related consolidated securities class action pending in this Court, captioned *Rosi v. Aclaris Therapeutics, Inc., et al.*, Case No. 1:19-cv-07118-LJL-JLC (S.D.N.Y.) (the "Securities Class Action"). The Court so ordered the stipulation the same day. (D.I. 10, 11).

On July 10, 2020, the Stockholder sent the Company the Inspection Demand. Counsel for the Stockholder and counsel for the Company exchanged several communications, and, on August 31, 2020, they entered into an agreement to stay the Inspection Demand until the resolution of the motion to dismiss in the Securities Class Action.

On March 29, 2021, the motion to dismiss in the Securities Class Action was granted in part and denied in part. (Securities Class Action, D.I. 51).

On May 6, 2021, the parties in the Derivative Action stipulated to continue the stay of the Derivative Action until the resolution of a motion for summary judgment in the Securities Class Action, which defendants intended to file had the parties to the Securities Class Action not agreed to a settlement. The Court so-ordered this stipulation on May 18, 2021. (D.I. 16, 18).

C. Settlement Negotiations

After May 6, 2021, consistent with agreements and discussions between the respective Plaintiffs' counsel and counsel for the Defendants, the Plaintiffs agreed with Defendants to attend a mediation at which the parties to the Securities Class Action also participated. The mediation was set for June 4, 2021 with the Mediator.

On May 13, 2021, counsel for the Settling Parties and the parties to the Securities Class Action attended a pre-mediation conference call with the Mediator. Following the call, the Settling Parties engaged in significant efforts to try to settle the derivative claims in the best interests of the Company.

On May 22, 2021, Plaintiffs sent a settlement demand letter to Defendants, proposing a settlement framework, which included a comprehensive set of corporate governance reforms designed to remedy perceived weaknesses in the Company's internal controls.

On May 25, 2021, the Plaintiffs and the Defendants exchanged substantive mediation briefs, addressing the allegations in the Derivative Action, including arguments and defenses relating to liability and damages.

On June 4, 2021, Defendants responded to Plaintiffs' settlement demand, and provided substantive responses to Plaintiffs' proposed corporate governance reforms.

On June 4, 2021, the Settling Parties attended the full-day mediation via Zoom. During the mediation, the Settling Parties' negotiations regarding the corporate governance reforms continued. Late in the day on June 4, 2021, the Settling Parties, with the assistance of the Mediator, reached an agreement in principle on the substantive terms of the proposed settlement, including corporate governance reforms that Aclaris would adopt as consideration for the settlement.

Following the Settling Parties' agreement in principle on the substantive terms of the proposed settlement, the Settling Parties separately negotiated the attorneys' fees and expenses that would be payable in recognition of the substantial benefits achieved through the settlement. Later in the evening of June 4, 2021, the Settling Parties, with the assistance of the Mediator,

reached an agreement on the attorneys' fees and expenses to be paid to Plaintiffs' Counsel by the Defendants' insurer.

On June 8, 2021, the Settling Parties executed a term sheet, which memorialized the material terms of the settlement of the Derivative Action and Inspection Demand, the terms of which are set forth in full in the Stipulation.

III. TERMS OF THE PROPOSED SETTLEMENT

In consideration of the Settlement, Aclaris will adopt and implement the Corporate Governance Reforms, which are set forth in Exhibit A to the Stipulation. The Corporate Governance Reforms directly address Plaintiffs' allegations in the Derivative Action and Inspection Demand. The Corporate Governance Reforms are designed to reduce the likelihood that similar alleged lapses giving rise to the Derivative Action and Inspection Demand recur, and strengthen the Company's overall corporate governance practices and internal controls generally. The Corporate Governance Reforms, which will be in place for at least three (3) years, will yield positive changes in Aclaris' internal operations and offer Aclaris and its stockholders the benefit of substantial, immediate, and lasting corporate governance reforms that provide for additional oversight and improvements to the Company's policies and practices. *See* Stipulation, Exhibit A. Below is a summary of each of the Corporate Governance Reforms.

Improvements to the Executive Compliance Committee: The Company's Executive Compliance Committee shall, in addition to its existing responsibilities, be responsible for reporting to the Audit Committee on an annual basis regarding the Chief Executive Officer's and Chief Financial Officer's contribution to Aclaris' culture of ethics and compliance and their effectiveness and dedication to ensuring Aclaris' compliance with applicable laws, rules, and regulations. The Executive Compliance Committee shall review Aclaris' internal controls over compliance, which review shall include an evaluation of the effectiveness of Aclaris' newly-

implemented controls and procedures, and shall implement changes as necessary. In addition, Aclaris shall promptly post the Executive Compliance Committee Charter, or other governing document, on the corporate governance section of its website.

Improvements to the Research and Development Committee: In addition to the existing responsibilities of the recently created Research and Development Committee, the Research and Development Committee shall be responsible for: (i) overseeing the Company's research and development strategy and related activities; (ii) meeting at least quarterly with the head of the Company's research & development department; (iii) overseeing the proper and timely disclosure of any significant issues or problems with ongoing clinical trials, tests, or other studies or analyses; and (iv) preparing an annual verbal report to the full Board, with the assistance of Aclaris management, regarding: (1) all clinical trials under way, including, but not limited to, all significant clinical data, results, studies, or analyses of drug safety and efficacy and all significant communications with reviewing regulatory agencies relating thereto; (2) any issues of concern regarding such clinical trials; and (3) the effectiveness of and proposed enhancements to Aclaris' public disclosures and disclosure policies and processes relating to clinical trials, tests, or other studies or analyses of drug safety and efficacy.

Improvements to the Whistleblower Policy: The Company shall strengthen its current Whistleblower Policy by amending it to require the Company to adequately notify employees, independent contractors, and vendors of Aclaris of the following: (i) executives are subject to criminal penalties, including imprisonment, for retaliation against whistleblowers; (ii) if a whistleblower brings his or her complaint to an outside regulator or other governmental entity, he or she will be protected by the terms of the Whistleblower Policy just as if he or she directed the complaint to the Executive Compliance Committee, Audit Committee, Chief Compliance

Officer ("CCO"), and/or The Compliance Hotline or Compliance Web-Reporting Tool; and (iii) if an employee is subject to an adverse employment decision as a result of whistleblowing, the employee may file a complaint with the Department of Labor consistent with the law in the applicable jurisdiction (a failure to report such claims does not foreclose any other available legal remedy). In addition, Aclaris shall post the amended Whistleblower Policy on the Company's website.

Employee Training: The Company shall ensure that its existing training program adheres to the following conditions: (i) in the event a director, officer, employee, independent contractor, or agent of Aclaris is appointed or hired after Aclaris' annual or periodic training for a particular period of time, a special training session shall be held for such individual within fourteen (14) business days of his or her appointment or hiring; and (ii) each written training certification shall be maintained by Aclaris' CCO for a period of ten (10) years from the date it was executed.

Aclaris and its Board acknowledge and agree that the Corporate Governance Reforms confer substantial benefits upon Aclaris and its stockholders. Aclaris also acknowledges and agrees that the filing, pendency, and settlement of the Derivative Action and the Inspection Demand were the cause of the Company's decision to adopt, implement, and maintain the Corporate Governance Reforms. Stipulation, § V, 2.1.

IV. THE PROPOSED SETTLEMENT WARRANTS PRELIMINARY APPROVAL

A. Legal Standards for Preliminary Approval of the Settlement

A derivative action "may be settled . . . only with the court's approval. Notice of a proposed settlement, voluntary dismissal, or compromise must be given to shareholders or members in the manner that the court orders." Fed. R. Civ. P. 23.1(c). Courts have long found that the settlements of disputed claims, particularly in complex class actions and shareholder

derivative litigation, are highly favored and not lightly rejected. *See In re AOL Time Warner S'holder Derivative Litig.*, No. 02 CIV. 6302(SWK), 2006 WL 2572114, at *3 (S.D.N.Y. Sept. 6, 2006); *In re Metro. Life Derivative Litig.*, 935 F. Supp. 286, 291 (S.D.N.Y. 1996) ("Public policy, of course, favors settlement."); *Mathes v. Roberts*, 85 F.R.D. 710, 713 (S.D.N.Y. 1980) (favoring settlements of derivative cases because such actions are "'notoriously difficult and unpredictable'") (quoting *Schimmel v. Goldman*, 57 F.R.D. 481, 487 (S.D.N.Y. 1973)). "The role of the court and the criteria considered in evaluating the adequacy and fairness of a derivative settlement are substantially the same as in the class action." 7 Alba Conte & Herbert Newberg, *Newberg on Class Actions* § 22.110, at 476 (4th ed. 2002).[3]

Preliminary approval is the first of two stages that comprise the approval procedure for settlements of derivative actions. The Court first reviews the proposal preliminarily to determine whether it is sufficient to warrant public notice and a hearing. If so, the Court then considers final approval of the settlement in a settlement hearing, after notice of settlement is provided to stockholders. *Manual for Complex Litigation, Fourth* § 13.14 (2004); *In re OSI Sys., Inc. Derivative Litig.*, No. CV142910MWFMRWX, 2017 WL 5634607, at *1 (C.D. Cal. Jan. 24, 2017) ("[A]pproval of a derivative action appears to be a two-step process, similar to that employed for approving class action settlements, in which the Court first determines whether a

[3] Under Federal Rule of Civil Procedure 23 for class actions, for preliminary approval, a court must determine whether "'giving notice is justified by the parties' showing 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)(B)(i)-(ii) (emphasis added). Because Rule 23(e)(2) sets forth the factors that a court must consider when weighing *final* approval, it appears that courts must assess at the preliminary approval stage whether the parties have shown that the court will likely find that the factors weigh in favor of final settlement approval." *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 330 F.R.D. 11, 28 (E.D.N.Y. 2019) (emphasis in original).

proposed settlement deserves preliminary approval and then, after notice of the settlement is provided to class members, determines whether final approval is warranted.") (quoting *In re MRV Commc'ns, Inc. Derivative Litig.*, No. CV 08-03800 GAF MANX, 2013 WL 2897874, at *2 (C.D. Cal. June 6, 2013)). Indeed, preliminarily approving a proposed settlement "is not tantamount to a finding that the settlement is fair and reasonable. It is at most a determination that there is what might be termed 'probable cause' to [issue notice] and hold a full-scale hearing as to its fairness." *In re Traffic Exec. Ass'n-E. Railroads*, 627 F.2d 631, 634 (2d Cir. 1980).

In determining whether preliminary approval is warranted, the central issue before the Court is whether the settlement is within the range of what might be found fair, reasonable, and adequate, so that notice of the proposed settlement should be given to stockholders and a hearing should be scheduled to consider final approval of the settlement. *See Manual for Complex Litigation,* § 21.632; *see also In re Wells Fargo & Co. S'holder Derivative Litig.*, 445 F. Supp. 3d 508, 517 (N.D. Cal. 2020) ("The court's task at the preliminary approval stage is to determine whether the settlement falls 'within the range of possible approval.'") (citation omitted); *In re India Globalization Cap., Inc., Derivative Litig.*, No. DKC 18-3698, 2020 WL 2097641, at *2 (D. Md. May 1, 2020) ("At the preliminary approval stage, the court assesses the proposed settlement to determine 'whether there has been a basic showing that the Proposed Settlement Agreement is sufficiently within the range of reasonableness so that notice . . . should be given.'") (internal quotation marks omitted).

Derivative Plaintiffs submit that this Court can find that the proposed Settlement is reasonable and notice should be disseminated because the Settlement here was negotiated in good faith, at arm's-length among experienced counsel, with the aid of a top mediator, and will result in substantial benefits for Aclaris and its stockholders. The Settlement is specifically

designed to address the alleged governance shortcomings that Plaintiffs contend contributed to the alleged misconduct at issue in the Derivative Action and the Inspection Demand. Furthermore, given the complexities of the Derivative Action and the Inspection Demand and the uncertainties inherent in shareholder litigation, the proposed Settlement eliminates the risk that Aclaris might otherwise not recover anything, including the improvement to corporate operations through the Corporate Governance Reforms. Settlement at this stage in the litigation will also limit the expense of risky, unnecessary, and prolonged litigation, which is in the best interest of Aclaris, its stockholders, and the Settling Parties. These reasons are more than sufficient to support Derivative Plaintiffs' submission that the Settlement is "within the range of possible approval" and should be preliminarily approved, as set forth below.

1. The Settlement Falls Within the Range of Possible Approval

a. The Settlement Is the Result of Non-Collusive, Arm's-Length Negotiations

In determining whether a settlement is fair, courts focus on whether the settlement was reached as a result of good faith bargaining at arm's length without collusion. *See, e.g.*, *Weinberger v. Kendrick*, 698 F.2d 61, 74 (2d Cir. 1982). "A strong initial presumption of fairness attaches to a proposed settlement if it is reached by experienced counsel after arm's-length negotiations." *Guevoura Fund Ltd. v. Sillerman*, No. 1:15-CV-07192-CM, 2019 WL 6889901, at *6 (S.D.N.Y. Dec. 18, 2019). Further, a mediator's involvement supports the presumption that a settlement is fair. *In re Fab Universal Corp. S'holder Derivative Litig.*, 148 F. Supp. 3d 277, 280 (S.D.N.Y. 2015) ("The Proposed Settlement was the product of extensive formal mediation aided by a neutral JAMS mediator, hallmarks of a non-collusive, arm's-length settlement process.")

Counsel's "recommendation for approval of the [p]roposed [s]ettlement is entitled to 'considerable weight'" after they "have thoroughly investigated and evaluated plaintiffs' claims" and when it "is the result of extensive arm's-length negotiations among counsel" for the parties. *Metro. Life.*, 935 F. Supp. at 294 (quoting *Fielding v. Allen*, 99 F. Supp. 137, 144 (S.D.N.Y. 1951)). Courts are encouraged to defer to counsel's support of a settlement and not substitute its judgment for the parties who agreed to the settlement. *Clark v. Ecolab Inc.*, No. 04CIV.4488PAC, 2010 WL 1948198, at *4 (S.D.N.Y. May 11, 2010) ("Absent fraud or collusion, [courts] should be hesitant to substitute [their] judgment for that of the parties who negotiated the settlement." (internal quotation marks omitted) (quoting *In re EVCI Career Colleges Holding Corp. Sec. Litig.*, No. 05 CIV 10240 CM, 2007 WL 2230177 (S.D.N.Y. July 27, 2007)); *Metro. Life*, 935 F. Supp at 292 ("[I]n determining whether a settlement is fair, reasonable, and adequate, the Court is not to substitute its judgment for that of the parties, nor is it to reopen and enter into negotiations with the parties, nor is it to turn consideration of the adequacy of the settlement 'into a trial or a rehearsal of the trial.'") (quoting *Detroit v. Grinnell Corp.*, 495 F.2d 448, 462 (2d Cir. 1974)); *Guevoura Fund*, 2019 WL 6889901, at *6 ("A strong initial presumption of fairness attaches to a proposed settlement if it is reached by experienced counsel after arm's-length negotiations, and great weight is accorded to counsel's recommendation.").

The Settlement is presumptively fair as each element of the Settlement was extensively negotiated between experienced counsel with the assistance of the Mediator. The Settlement is the product of significant give and take between the Settling Parties and was only reached after a full day mediation session and extensive negotiations between their respective counsel. These facts demonstrate that settlement is procedurally fair as it was reached after negotiations at

arm's-length, in good faith, and free of collusion. Thus, the proposed Settlement is presumed fair and warrants preliminary approval.

b. The Settlement Appropriately Balances the Substantial Benefits Secured for the Company and Its Stockholders Against the Risks, Costs, and Delays of Continued Litigation

Derivative Plaintiffs respectfully submit that the Settlement is an excellent result and easily meets the standards for both preliminary and final approval. Aclaris and its Board acknowledge and agree that the Corporate Governance Reforms confer substantial benefits upon Aclaris and its stockholders. Aclaris also acknowledges and agrees that the filing, pendency, and settlement of the Derivative Action and the Inspection Demand were the cause of the Company's decision to adopt, implement, and maintain the Corporate Governance Reforms. *See* Stipulation, §§ IV; V, 2.1.

The initiation and prosecution of the Derivative Action and Inspection Demand, and the ensuing Settlement, provide immediate and long-lasting benefits to Aclaris and its stockholders in the form of the Corporate Governance Reforms. The Settlement allows Aclaris to resolve the Derivative Action and the Inspection Demand and to focus on implementing the Corporate Governance Reforms to improve the Company's operations.

Courts widely recognize the "substantial benefit" conferred upon public corporations and their stockholders through the adoption of corporate therapeutics similar to the Corporate Governance Reforms agreed to in the Stipulation and described above. *See Mills v. Elec. Auto-Lite Co.*, 396 U.S. 375, 395-96 (1970) ("[A] corporation may receive a 'substantial benefit' from a derivative suit . . . regardless of whether the benefit is pecuniary in nature."); *Bell Atl. Corp. v. Bolger*, 2 F.3d 1304, 1311 (3d Cir. 1993) (citing 4th, 5th, and 6th Circuit precedents); *In re NVIDIA Corp. Derivative Litig.*, No. C-06-06110-SBA(JCS), 2008 WL 5382544, at *3 (N.D.

Cal. Dec. 22, 2008) ("As corporate debacles such as Enron, Tyco and WorldCom demonstrate, strong corporate governance is fundamental to the economic well-being and success of a corporation.").

The benefits conferred upon Aclaris and its stockholders as a result of the Settlement: (i) are immediate and long-lasting; (ii) specifically address Plaintiffs' allegations in the Derivative Action and the Inspection Demand; and (iii) will substantially reduce the likelihood that lapses similar to the alleged lapses giving rise to the Derivative Action and Inspection Demand will recur in the future. The Settlement provides Aclaris and its stockholders with substantial and immediate benefits while eliminating numerous risks, costs, and burdens of litigation for all concerned, including Aclaris.

While Plaintiffs and their counsel believe that the claims alleged in the Derivative Action and Inspection Demand are meritorious and that their investigations thus far support such belief, derivative litigation is "notably difficult and unpredictable." *Zerkle v. Cleveland-Cliffs Iron Co.*, 52 F.R.D. 151, 159 (S.D.N.Y. 1971). Indeed, "derivative lawsuits are rarely successful." *In re Pac. Enterprises Sec. Litig.*, 47 F.3d 373, 378 (9th Cir. 1995).

Derivative Plaintiffs faced the significant risk that the Derivative Action might not have withstood challenge at the pleading stage, especially given the heightened Federal Rule of Civil Procedure 23.1 standard for pleading demand futility. *See In re Am. Int'l Grp., Inc. Derivative Litig.*, 700 F. Supp. 2d 419, 430 (S.D.N.Y. 2010), *aff'd,* 415 F. App'x 285 (2d Cir. 2011) (noting that Rule 23.1 requires more than notice pleading and requires particularized allegations); *Fab Universal*, 148 F. Supp. 3d at 281-82 ("The doctrine of demand futility . . . and the generally uncertain prospect of establishing a breach of fiduciary duties combine to make shareholder derivative suits an infamously uphill battle for plaintiffs.").

Even if Derivative Plaintiffs succeeded in overcoming this hurdle, significant costs and risks would remain for Derivative Plaintiffs to improve the result through further litigation. Continued litigation would be protracted and expensive, considering the complexity, uncertainty, and risks inherent in the Derivative Action, including the very real risk of no recovery. *See* Stipulation, § II. Should this litigation continue, Derivative Plaintiffs would face the high costs associated with lengthy and complex litigation, including voluminous discovery and many depositions, potential loss on summary judgment, and the inherent risks of trial, should the case progress that far. Even a favorable judgment at trial would undoubtedly result in extensive post-trial motions and appeal. Moreover, the amount of recoverable damages would have posed significant issues and would have been subject to further litigation.

The Settlement, however, eliminates these and other risks, including the risk of no recovery for Aclaris after potentially years of additional litigation, while ensuring that the Company and its stockholders obtain immediate and substantial benefits through the implementation of the Corporate Governance Reforms. *See* Stipulation, Exhibit A. The Settlement also secures the benefit of freeing Company resources and time that would otherwise be spent on litigating the Derivative Action to strengthen Aclaris' internal controls and operations. *AOL Time Warner*, 2006 WL 2572114 at *5 ("Termination of the litigation at this stage of the proceedings 'obviat[es] the expenditure of any future time and expense in connection with this action,' and will allow the Company to direct its full attention to its substantive business.") (quoting *Mathes*, 85 F.R.D. at 714). Weighed against the substantial risk that continued litigation would yield no benefit for Aclaris, the recovery here is fair, reasonable, and adequate. Accordingly, the Settlement should be preliminarily approved as a practical resolution of a complex and costly litigation, and is in the best interest of Aclaris and Aclaris stockholders.

V. THE COURT SHOULD APPROVE THE FORM AND MANNER OF NOTICE

Federal Rule of Civil Procedure 23.1(c) requires notice of a proposed shareholder derivative settlement be given to stockholders "in the manner that the court orders." Fed. R. Civ. P. 23.1(c). Thus, the Court has discretion in approving the notice's contents and the manner in which notice will be provided. *See, e.g.*, *Arace v. Thompson*, No. 08 CIV. 7905 DC, 2011 WL 3627716, at *4 (S.D.N.Y. Aug. 17, 2011). Notice of settlement proceedings in a derivative action must meet the due process requirements of *Mullane v. Central Hanover Bank & Trust Company* that notice be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." 339 U.S. 306, 314 (1950).

Derivative Plaintiffs seek Court approval of the proposed form and manner of notice of the Settlement to Current Aclaris Stockholders and seek entry of an order directing such notice. The Stipulation and the Proposed Preliminary Approval Order provides that the Notice substantially in the form attached to the Stipulation as Exhibit C, shall be issued via a press release on *GlobeNewswire* or *PR Newswire*; shall be filed with the U.S. Securities and Exchange Commission ("SEC"), together with the Stipulation, as exhibits to a Form 8-K; and shall be posted, together with the Stipulation, on the Investor Overview page of Aclaris' corporate website. The proposed Notice describes: (i) the Settlement terms; (ii) the procedure for objecting to the Settlement; (iii) the date of the Settlement Hearing; and (iv) the payment of Plaintiffs' Counsel's fees and expenses and payment of Service Awards to Plaintiffs. *See* Stipulation, Exhibit C. The proposed notice program is reasonably calculated to apprise Current Aclaris Stockholders of the pendency and Settlement of the Derivative Action and Inspection Demand and affords them an opportunity to present their objections, if any.

The Settling Parties believe that this comprehensive method of disseminating notice to Aclaris' stockholders is adequate, reasonable, and satisfies both Federal Rule of Civil Procedure 23.1(c) and constitutional due process standards. Stipulation, § V, 3.2. Indeed, the Settling Parties' proposed method of notice has been approved by numerous courts as reasonable and sufficient to satisfy due process.[4] Accordingly, the proposed form and plan of notice warrant this Court's approval.

VI. PROPOSED SCHEDULE OF EVENTS

In connection with preliminary approval of the Settlement, Derivative Plaintiffs request that the Court establish dates by which the notice of the Settlement will be disseminated to Current Aclaris Stockholders, by which Current Aclaris Stockholders may comment on the Settlement, and on which the Settlement Hearing will be held.

If the Court grants preliminary approval as the Settling Parties request, then the only date that the Court needs to schedule is the date for the Settlement Hearing. *See* proposed Preliminary

[4] The use of website posting coupled with other publication has gained broad acceptance in light of the rapid transition of the investment community from a paper-based to a web-based disclosure system. *See* "Use of Electronic Media for Delivery Purposes," SEC Release No. 33-7233, 60 Fed. Reg. 53458, 53459 (Oct. 6, 1995) ("The Commission believes that the use of electronic media should be at least an equal alternative to the use of paper-based media."). The notice program that the Settling Parties stipulated to employ in this case is akin to the means of notice that has been widely used in similar shareholder derivative settlements and approved by numerous courts as meeting due process. *See, e.g.*, *Peak Fin., LLC v. Hassett*, No. 2:15-cv-01590-GMN-CWH, 2016 U.S. Dist. LEXIS 147565, at *3-4, 9 (D. Nev. Oct. 20, 2016) (approving settlement where notice comprised filing of a Form 8-K with the SEC, and the company's posting on its website); *Bushansky v. Armacost*, No. 12-CV-01597-JST, 2014 WL 2905143 (N.D. Cal. June 25, 2014) (requiring a notice plan to include a link on defendant's investor relations website that leads to a webpage to be displayed for a minimum of thirty days, a press release to be issued by defendant, and a Form 8-K filing with the SEC); *In re Rambus Inc. Derivative Litig.*, No. C 06-3513 JF (HRL), 2009 WL 166689 (N.D. Cal. Jan. 20, 2009) (approving settlement where notice included posting on the company's website, press release, and a Form 8-K filing with the SEC). *See also Yong Soon Oh v. AT & T Corp.*, 225 F.R.D. 142, 149 (D.N.J. 2004) (approving settlement of class action in which access to the stipulation of settlement was made available by website).

Approval Order ¶ 3. Other deadlines will be based, pursuant to the Preliminary Approval Order, on the date of the Settlement Hearing and the date that the Court enters the proposed Preliminary Approval Order, as set forth in the table below. Derivative Plaintiffs propose that the Court set the Settlement Hearing at least fifty-five (55) days after the date that the Court enters the proposed Preliminary Approval Order.

Event	**Deadline**
Deadline for issuing the Notice via a press release on *GlobeNewswire* or *PR Newswire*, filing the Notice and the Stipulation with the SEC as exhibits to a Form 8-K, and posting the Notice and the Stipulation on the Investor Overview page of Aclaris' corporate website	Within ten (10) calendar days after the entry of the Preliminary Approval Order
Deadline for filing all papers in support of the final approval of Settlement and the Fee and Expense Amount	At least twenty-one (21) calendar days prior to the Settlement Hearing
Deadline for Defendants' Counsel to file proof with the Court of the dissemination of the notice of the Settlement by affidavit or declaration	At least twenty-one (21) calendar days prior to the Settlement Hearing
Deadline for any objections by Current Aclaris Stockholders to the Settlement or the Fee and Expense Amount to be filed with the Court and served on counsel for the Settling Parties	At least fourteen (14) calendar days prior to the Settlement Hearing
Deadline for filing of any reply papers to objections by Current Aclaris Stockholders, if any	At least seven (7) calendar days prior to the Settlement Hearing
Settlement Hearing date	At least fifty-five (55) days after the entry of the Preliminary Approval Order

This schedule, similar to those used in numerous derivative settlements, affords due process to the Company's stockholders concerning their rights with respect to the Settlement.

VII. CONCLUSION

Based on the foregoing, Derivative Plaintiffs respectfully request that the Court enter the

proposed Preliminary Approval Order, which: (1) grants preliminary approval of the proposed Settlement; (2) directs that notice of the proposed Settlement be given to Current Aclaris Stockholders in the proposed form and manner set forth in the Stipulation; (3) schedules the Settlement Hearing; and (4) grants such other relief as the Court deems just and proper.

Dated: July 30, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 30, 2021, a true and correct copy of the foregoing document was served by CM/ECF to the parties registered to the Court's CM/ECF system.

/s/ Philip Kim
Phillip Kim

EXHIBIT D

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

EMPLOYEES RETIREMENT SYSTEM OF THE CITY OF ST. LOUIS, *et al.*,	:	
Plaintiffs,	:	**Case No. 2:20-cv-4813**
v.	:	**Chief Judge Algenon L. Marbley**
	:	**Magistrate Judge Kimberly A. Jolson**
CHARLES E. JONES, *et al.*,	:	
Defendants,	:	
FIRSTENERGY CORP.,	:	
Nominal Defendant.	:	

ORDER OF PRELIMINARY SETTLEMENT APPROVAL

This matter is before the Court on Plaintiffs' Unopposed Motion for Preliminary Settlement Approval (ECF No. 170). Plaintiffs' Motion is **GRANTED** with the modification noted below.

I. BACKGROUND OF PROPOSED SETTLEMENT

According to the Consolidated Complaint, this shareholder derivative action seeks to hold current and former FirstEnergy Directors and Officers accountable for their roles in orchestrating a large bribery, racketeering, and pay-to-play scheme with Ohio politicians, at substantial cost to the Company's long-term interests. (ECF No. 75 ¶¶ 1–14). The Complaint asserts a federal cause of action for violation of Section 14(a) of the Securities Exchange Act of 1934 and Rule 14a-9 thereunder, as well as state law claims for breach of fiduciary duty, unjust enrichment, corporate waste, and contribution and indemnification. On May 11, 2021, the Court found that Plaintiffs' allegations pass muster and denied Defendants' motion to dismiss. (ECF No. 93).

There are two other shareholder derivative actions pending against FirstEnergy in relation to the alleged bribery scandal. One is in the Northern District of Ohio under the caption *Miller v.*

Anderson, Case No. 5:20-cv-1743-JRA (the "Northern District Action"); and the other is in the Summit County Court of Common Pleas under the caption *In re FirstEnergy Corp., Stockholder Derivative Litigation*, Case No. CV-2020-07-2107 (the "Ohio State Court Action").[1]

All parties in all shareholder derivative cases, as well as the Special Litigation Committee of FirstEnergy's Board of Directors, have entered into a Stipulation and Agreement of Settlement (the "Stipulation"), dated March 11, 2022. (ECF No. 170-3). The Stipulation sets forth the terms and conditions of a proposed global settlement of the shareholder derivative cases, subject to the Court's review and approval.

The proposed settlement resulted from a lengthy mediation before retired United States District Judge Layn R. Phillips. (ECF No. 170 at 10). Under the proposed terms, FirstEnergy will obtain a $180 million recovery funded by the Company's insurers —which Plaintiffs represent is "among the largest derivative recoveries ever achieved" in the United States and "three times greater than any prior derivative recovery in the history of the Sixth Circuit." (*Id.* at 2, 12). Moreover, FirstEnergy will commit to a series of internal governance reforms, crafted with the assistance of Columbia Law Professor and corporate governance expert Jeffrey Gordon. (*Id.* at 2). Those reforms include the departure of six Directors, active Board oversight of FirstEnergy's political spending and lobbying activities, and specific disclosures in the annual proxy statements issued to shareholders. (*Id.* at 12). Professor Gordon states the governance reforms "will significantly improve shareholder welfare at FirstEnergy" by giving "assurance . . . against a recurrence of the conduct" that precipitated this case. (ECF No. 170-5 ¶ 22). These settlement terms now stand before the Court for preliminary approval.

[1] For clarity, these shareholder derivative actions are wholly distinct from other litigation involving FirstEnergy—including the class action for securities fraud captioned *In re FirstEnergy Corp. Securities Litigation*, Case No. 2:20-cv-3785, which also is pending before this Court.

II. APPLICABLE STANDARD

Under Federal Rule of Civil Procedure 23.1(c), court approval and shareholder notice are required for the settlement of any derivative case. The typical approval process tracks that of a class action settlement, which entails: "1) preliminary approval of the proposed settlement at an informal hearing; 2) dissemination of mailed and/or published notice to all affected class members; and 3) a formal fairness hearing at which interested parties may comment on the proposed settlement." *Brent v. Midland Funding, LLC*, 2011 WL 3862363, at *12 (N.D. Ohio Sept. 1, 2011) (citing *Williams v. Vukovich*, 720 F.3d 909, 920–21 (6th Cir. 1983)); *see also In re: Regions Morgan Keegan Sec.*, 2015 WL 11145134, at *2 (W.D. Tenn. Nov. 30, 2015) ("The procedure for approving settlements in derivative actions is the same as class actions.").

At the preliminary approval stage, "the Court decides whether notice of the proposed settlement would be appropriate, but makes no final determination about the settlement's fairness." *Id.* at *4. "If the proposed settlement appears to be the product of serious, informed, non-collusive negotiations, has no obvious deficiencies, does not improperly grant preferential treatment to class representatives or segments of the class, and falls with the range of possible approval, then the Court should direct that notice be given to the class members of a formal fairness hearing, at which evidence may be presented in support of and in opposition to the settlement." *In re Telectronics Pacing Sys., Inc.*, 137 F. Supp. 2d 985, 1015–16 (S.D. Ohio 2001) (quoting *Manual for Complex Litig.* § 30.44 (2d ed. 1985)). The court "is not obligated to, nor could it reasonably, undertake a full and complete fairness review" at the preliminary approval stage; that analysis occurs on final approval. *In re Inter-Op Hip Prosthesis Liab. Litig.*, 204 F.R.D. 330, 350 (N.D. Ohio 2001).

In the Sixth Circuit, "[s]ettlements are welcome" in shareholder derivative cases, especially, "because litigation is 'notoriously difficult and unpredictable.'" *Granada Invs., Inc. v.*

DWG Corp., 962 F.2d 1203, 1205 (6th Cir. 1992) (quoting *Maher v. Zapata Corp.*, 714 F.2d 436, 455 (5th Cir. 1983)). "Absent evidence of fraud or collusion, such settlements are not to be trifled with." *Id.* (citing *Priddy v. Edelman*, 883 F.2d 438, 447 (6th Cir. 1989)).

III. PRELIMINARY FINDINGS AND CONCLUSIONS

The Court has reviewed and considered the Stipulation and all its exhibits, including the proposed notices and proposed final judgment. (ECF No. 170-3). From that review, the Court determines that the proposed settlement meets the standard articulated above and that preliminary approval is warranted.

First, the proposed settlement was reached through serious arms-length negotiation, facilitated by a reputable independent mediator. The negotiations followed a contested motion to dismiss and a voluminous exchange of document discovery. On these facts, "the proposed settlement appears to be the product of serious, informed, non-collusive negotiations"—at least on preliminary review. *Telectronics*, 137 F. Supp. 2d at 1015–16 (internal quotation marks omitted); *see also Bert v. AK Steel Corp.*, 2008 WL 4693747, at *2 (S.D. Ohio Oct. 23, 2008) ("The participation of an independent mediator in settlement negotiations virtually [e]nsures that the negotiations were conducted at arm's length and without collusion between the parties.").

Second, the proposed settlement represents a substantial (though not complete) recovery for FirstEnergy, the real party at interest. The monetary component, at $180 million, measures favorably against other shareholder derivative settlements and would have a significant effect on the Company's financial position. Moreover, the Company's insurance policies, which are the main source of recoverable assets, are being eroded by legal costs as this derivative action continues, meaning the ultimate recovery might be higher now than at the end of a case tried to verdict. Added value is found in the corporate governance reforms, which aim to prevent future

improprieties in the Company's political activity and forestall potential liabilities and harms therefrom. By demonstrating a commitment to transparency and oversight, the reforms also would begin to repair FirstEnergy's non-pecuniary reputational damages. Furthermore, the Court recognizes that certainty and finality are beneficial to FirstEnergy, whereas continued litigation entails inherent uncertainties that could weigh on the Company for years. Thus, the proposed settlement terms "fall[] with the range of possible approval," pending fuller analysis at the fairness hearing. *Telectronics*, 137 F. Supp. 2d at 1015–16 (internal quotation marks omitted).

In one respect, the Court will deviate from the parties' requested approval. The parties seek "a customary prosecution bar enjoining Plaintiffs, FirstEnergy, or anyone else from commencing or prosecuting any other action asserting any of the claims alleged in this Action—including the Northern District Action and the State Court Action—pending this Court's determination as to whether final approval should be granted." (ECF No. 170 at 26). However, the parties do not identify the authority by which this Court could stay related cases in co-equal courts of competent jurisdiction. Nor is it an obvious proposition, in this unique posture. Therefore, the prosecution bar will apply only to this case and to others not yet commenced; it will not extend to the pending Northern District and State Court Actions. If the parties wish to stay the other active cases, they may move in those respective courts. Alternatively, they may file a motion to alter or amend this Order, identifying the specific authority by which one court might enter a global prosecution bar over the objections of another court.

In summary, preliminary approval is appropriate, and it is so granted. The proposed settlement resulted from serious mediation, and its terms contain no facial defects that would foreclose approval. This is enough for the parties to commence shareholder notice and advance to a fairness hearing. Of course, preliminary approval "is only the first step in an extensive and

searching judicial process, which may or may not result in final approval of a settlement in this matter." *Inter-Op*, 204 F.R.D. at 337. Any findings on whether the proposed settlement is in fact fair, reasonable, and adequate are reserved until the fairness hearing, where the Court will conduct further inquiry informed by shareholders' perspectives.

IV. ORDER OF PRELIMINARY APPROVAL

Having found that sufficient grounds exist for entering this preliminary approval, the Court hereby **ORDERS** as follows:

1. The Court preliminarily approves the Settlement on the terms set forth in the Stipulation,[2] subject to further consideration at a hearing to be held before the Court on **Thursday, July 21, 2022, at 9:00 a.m.**, in Courtroom 1, Room 331, of the United States District Court for the Southern District of Ohio, 85 Marconi Boulevard, Columbus, Ohio 43215 (the "Settlement Fairness Hearing"), to, among other things: (i) determine whether the proposed Settlement, on the terms and conditions provided for in the Stipulation, is fair, reasonable, and adequate, and should be approved by the Court; (ii) determine whether the Judgment, substantially in the form attached as Exhibit F to the Stipulation, should be entered dismissing the Southern District Action with prejudice, and settling and releasing, and barring and enjoining the commencement or prosecution of any action asserting, any and all Released Plaintiffs' Claims against the Released Defendants' Persons, as set forth in the Stipulation; (iii) determine whether the application for a Fee and Expense Award to Plaintiffs' Counsel should be approved; and (iv) rule on such other matters as the Court may deem appropriate.

2. The Court expressly reserves the right to adjourn the Settlement Fairness Hearing without any further notice other than an announcement at the Settlement Fairness Hearing. The

[2] This Order incorporates by reference the definitions in the Stipulation and, unless otherwise defined in this Order, all capitalized terms used in this Order shall have the same meaning as set forth in the Stipulation.

Court may decide to hold the Settlement Fairness Hearing by telephone or video conference without notice to the FirstEnergy stockholders. If the Court later orders that the Settlement Fairness Hearing be conducted telephonically or by video conference, that decision will be posted on the "Investor Relations" portion of FirstEnergy's website. Any Current FirstEnergy Stockholder (or his, her, or its counsel) who wishes to appear at the Settlement Fairness Hearing should consult the Court's docket and the "Investor Relations" portion of FirstEnergy's website for any change in date, time, or format of the Settlement Fairness Hearing.

3. The Court expressly reserves the right to approve the Settlement with such modification(s) as may be consented to by the Settling Parties, or without modification, and with or without further notice of any kind to FirstEnergy stockholders. The Court reserves the right to enter its Judgment approving the Settlement and dismissing the Released Plaintiffs' Claims as against the Released Defendants' Persons regardless of whether the Court has awarded the Fee and Expense Award.

4. The Court approves the form, content, and requirements of the Notice, attached to the Stipulation as Exhibit D, and the Summary Notice, attached to the Stipulation as Exhibit E, and finds that the dissemination of the Notice and publication of the Summary Notice, substantially in the manner and form set forth in this Order, meets the requirements of Rule 23.1 of the Federal Rules of Civil Procedure, due process, and all other applicable law and rules, and constitutes due and sufficient notice of all matters relating to the Settlement.

5. By no later than five (5) business days after the date of entry of this Preliminary Approval Order, the Company (or its successor-in-interest) shall cause: (a) the filing with the SEC of a Current Report on Form 8-K, attaching the Notice, substantially in the form attached as Exhibit D to the Stipulation, and the Stipulation; (b) the publication of the Summary Notice, substantially

in the form attached as Exhibit E to the Stipulation, once in the *Wall Street Journal*, *Investor's Business Daily*, or similar publication; and (c) the posting of the Notice and the Stipulation on the "Investor Relations" portion of the Company's website, which documents shall remain posted thereto through the Effective Date of the Settlement. The Company shall pay or cause to be paid any and all Notice Costs regardless of the form or manner of notice ordered by the Court and regardless of whether the Court approves the Settlement or the Effective Date of the Settlement otherwise fails to occur, and in no event shall Defendants, Plaintiffs, or their respective attorneys be responsible for any such costs or expenses.

6. By no later than twenty-one (21) calendar days before the Settlement Fairness Hearing, counsel for the SLC on behalf of the Company shall file with the Court an appropriate proof of compliance with the notice procedures set forth in this Order.

7. Any person or entity who owns shares of FirstEnergy common stock as of the close of business on the date of the Stipulation ("Current FirstEnergy Stockholder") and who continues to own shares of FirstEnergy common stock through the date of the Settlement Fairness Hearing may appear at the Settlement Fairness Hearing to show cause why the proposed Settlement should not be approved; why the Judgment should not be entered thereon; or why the application for an award of attorneys' fees and expenses to Plaintiffs' Counsel and service awards to Plaintiffs should not be granted; provided, however, that no such person shall be heard or entitled to contest the approval of the terms and conditions of the proposed Settlement, the Judgment to be entered approving the same, or the application for an award of attorneys' fees and expenses to Plaintiffs' Counsel and service awards to Plaintiffs, unless such person has filed with the Clerk of the United States District Court for the Southern District of Ohio, 85 Marconi Boulevard, Columbus, Ohio 43215, and delivered (by hand, first-class mail, or express service) to counsel at the addresses

stated below, a written, signed objection that: (i) identifies the case name and case number for the Southern District Action, *Employees Retirement System of the City of St. Louis, et al. v. Jones, et al.*, Case No. 2:20-cv-4813-ALM-KAJ; (ii) states the objector's name, address, and telephone number, and if represented by counsel, the name, address, and telephone number of his, her, or its counsel; (iii) contains a representation as to whether the objector and/or his, her, or its counsel intends to appear at the Settlement Fairness Hearing; (iv) contains a statement of the objection(s) to any matters before the Court, the grounds for the objection(s) or the reasons for the objector's desiring to appear and be heard, as well as all documents or writings the objector desires the Court to consider, including any legal and evidentiary support; (v) if the objector has indicated that he, she, or it intends to appear at the Settlement Fairness Hearing, identifies any witnesses the objector may call to testify and any exhibits the objector intends to introduce into evidence at the Settlement Fairness Hearing; and (vi) includes documentation sufficient to prove that the objector owned shares of FirstEnergy common stock as of the close of business on the date of the Stipulation, together with a statement that the objector continues to hold shares of FirstEnergy common stock on the date of filing of the objection and will continue to hold shares of FirstEnergy common stock as of the date of the Settlement Fairness Hearing. Any such objection must be filed with the Court no later than fourteen (14) calendar days prior to the Settlement Fairness Hearing and delivered to each of the below-noted counsel such that it is received no later than fourteen (14) calendar days prior to the Settlement Fairness Hearing.

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8. Any person or entity who fails to object in the manner prescribed above shall be deemed to have waived such objection and shall forever be foreclosed from making any objection to any aspect of the Settlement, the Judgment to be entered approving the Settlement, or the application for an award of attorneys' fees and expenses to Plaintiffs' Counsel and service awards to Plaintiffs, in the Southern District Action or in any other action or proceeding in any court or tribunal.

9. The contents of the Settlement Fund shall be deemed and considered to be *in custodia legis* of the Court, and shall remain subject to the jurisdiction of the Court, until such time as they shall be transferred or disbursed from the Settlement Fund pursuant to the Stipulation and/or further order(s) of the Court.

10. Co-Lead Counsel for the Southern District Plaintiffs is authorized and directed to prepare any tax returns and any other tax reporting form for or in respect to the Settlement Fund, to pay from the Settlement Fund any Taxes owed with respect to the Settlement Fund, and to otherwise perform all obligations with respect to Taxes and any reporting or filings in respect

thereof without further order of the Court in a manner consistent with the provisions of the Stipulation.

11. Plaintiffs shall file and serve papers in support of final approval of the proposed Settlement and in support of their application for the Fee and Expense Award by no later than twenty-eight (28) calendar days prior to the Settlement Fairness Hearing. If reply papers are necessary, they are to be filed and served by no later than seven (7) calendar days prior to the Settlement Fairness Hearing.

12. In the event the Settlement is terminated or the Effective Date does not occur for any reason, then: (i) the Settlement and the relevant portions of the Stipulation shall be canceled; (ii) the Settling Parties shall revert to their respective litigation positions in the Actions as of immediately prior to the execution of the Term Sheet on February 9, 2022; and (iii) the terms and provisions of the Stipulation shall have no further force and effect with respect to the Settling Parties and shall not be used in the Actions or in any other proceeding for any purpose, and the Settling Parties shall proceed in all respects as if the Stipulation had not been entered.

13. Pursuant to the Court's Order dated February 11, 2022, all pleading deadlines, discovery, and other proceedings in the Southern District Action (except as may be necessary to carry out the terms and conditions of the proposed Settlement) have been stayed and suspended until further order of the Court.

14. The Court retains exclusive jurisdiction over the Southern District Action to consider all further matters arising out of or related to the Settlement.

15. Pending the Court's determination as to final approval of the Settlement, Plaintiffs, FirstEnergy, FirstEnergy stockholders, and anyone acting or purporting to act on behalf of FirstEnergy are hereby barred and enjoined from commencing or prosecuting any action asserting

any of the claims alleged in the Southern District Action against any of the Defendants in any court or tribunal; *provided*, this prosecution bar shall not extend to the Northern District Action, nor to the State Court Action, unless those courts agree to stay their respective cases; *and further provided*, all forms and notices approved herein shall be updated as necessary to reflect the accurate scope of this prosecution bar.

IT IS SO ORDERED.

ALGENON L. MARBLEY
CHIEF UNITED STATES DISTRICT JUDGE

DATED: May 9, 2022