UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE TOWER GROUP INTERNATIONAL, LTD. SECURITIES LITIGATION	Master File No. 1:13-cv-5852-AT Date: November 23, 2015 Time: 4:15 p.m. Judge: Hon. Analisa Torres Courtroom: 15D

MEMORANDUM OF LAW
IN SUPPORT OF LEAD PLAINTIFFS' MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT WITH TOWER DEFENDANTS AND APPROVAL OF PLAN OF ALLOCATION OF SETTLEMENT PROCEEDS

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I. INTRODUCTION

Pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, Lead Plaintiffs the Kansas City, Missouri Employees' Retirement System, Jacksonville Police and Fire Pension Fund, the Oklahoma Firefighters Pension & Retirement System, ADAR Enhanced Investment Fund, Ltd. and ADAR Investment Fund, Ltd. (collectively, "Lead Plaintiffs"), respectfully submit this memorandum of law in support of their motion for final approval of the class action Settlement with the Tower Defendants, and approval of the proposed plan for allocating the Net Settlement Fund.[1]

The Settlement provides for payment of $20.5 million in cash by or on behalf of the Tower Defendants, for the benefit of the Settlement Classes.[2] The Settlement is the product of Lead Plaintiffs' extensive investigation, full briefing on the Tower Defendants' motion to dismiss, and mediation and further negotiations before an experienced and nationally-recognized mediator, Jed D. Melnick, Esq. of JAMS. Based on his involvement in the negotiations, review and analysis of the parties' mediation submissions, extensive communications with the parties, and assessment of the risks inherent in this litigation, Mr. Melnick made a double-blind "mediator's proposal" to settle the claims against the Tower Defendants for $20.5 million in cash, which the parties separately accepted. *See* Declaration of Mediator Jed D. Melnick, Esq. in Support of Final

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[1] Lead Plaintiffs respectfully refer the Court to the accompanying Joint Declaration of James A. Harrod, Joseph A. White, III, and U. Seth Ottensoser in Support of Final Approval of Class Action Settlement with Tower Defendants, Approval of the Plan of Allocation, and Approval of Lead Counsel's Application for an Award of Attorneys' Fees and Reimbursement of Litigation Expenses ("Lead Counsel Decl.") for a detailed description of the case and the Settlement. Unless otherwise noted, capitalized terms have the meanings set forth in the Stipulation and Agreement of Settlement dated July 20, 2015 (ECF No. 148, the "Stipulation" or the "Stip.").

[2] As certified by the Court in the August 13, 2015 Order Preliminarily Approving Proposed Settlement and Providing for Notice (ECF No. 152, the "Preliminary Approval Order"), the "Settlement Classes" consist of persons who purchased or otherwise acquired Tower common stock during the Settlement Class Period of March 1, 2010 through December 17, 2013, inclusive, and were damaged thereby (more fully defined as the "Settlement Class"), and persons who acquired Canopius Holdings Bermuda Limited ("Canopius") stock in the March 7, 2013 private placement in conjunction with the merger between Canopius and Tower Group, Inc., and were damaged thereby (more fully defined as the "Settlement PPC").

Approval of Class Action Settlement with Tower Defendants ("Mediator Decl."), submitted herewith as Exhibit 5 to the Lead Counsel Decl., ¶8.

The terms of the Settlement are set forth in the Stipulation, ECF No. 148. In the Court's August 13, 2015 Preliminary Approval Order, the Court preliminarily approved the Settlement, certified the Settlement Classes for purposes of the Settlement, and directed notice be distributed to potential members of the Settlement Classes. On or about August 21, 2015, the Tower Defendants caused the $20.5 million Settlement Amount to be deposited into an escrow account for the benefit of the Settlement Classes. Lead Counsel Decl. ¶6.

By the time the parties agreed to the Settlement, they had developed a full and clear understanding of the strengths and weaknesses of the claims and defenses asserted in the Action. During the course of the Action, Lead Plaintiffs and Lead Counsel: (i) conducted an extensive investigation, including review and analysis of Tower's public filings with the Securities and Exchange Commission (the "SEC"), research and analyst reports, Tower's conference call transcripts and presentations, Tower's press releases, news and media reports concerning Tower, and the private placement materials issued in conjunction with the March 2013 merger between Canopius and Tower Group, Inc.; and identified and interviewed numerous percipient witnesses; (ii) prepared detailed consolidated complaints; (iii) fully briefed defendants' motions to dismiss; (iv) consulted with experts on issues such as accounting for loss reserves, actuarial processes, loss causation and damages, and foreign law; (v) researched the applicable law with respect to the claims of Lead Plaintiffs and the Settlement Classes, as well as defendants' potential defenses and other litigation issues; (vi) drafted and exchanged comprehensive mediation statements and supplemental statements; (vii) presented at a full-day mediation session at JAMS; and (viii) engaged in numerous settlement negotiations with experienced defense counsel facilitated by a mediator. Lead Counsel Decl. Sections II, III.A.

While Lead Plaintiffs and Lead Counsel believe that the Settlement Classes have strong claims, they recognize that they would have faced significant risks in establishing all the elements of their claims. Indeed, the Court has since granted the motion to dismiss filed by the remaining

defendant, PricewaterhouseCoopers LLP ("PwC") with respect to the inadequacy of the scienter allegations against PwC. ECF No. 155.

Lead Plaintiffs and Lead Counsel believe that the Settlement with the Tower Defendants is a very favorable result for the Settlement Classes considering the risks and delay of continued litigation, including the risks surrounding liability and damages. In addition, Lead Plaintiffs and Lead Counsel understood the real limitations on the ability to actually recover a substantial judgment against the Tower Defendants in light of ACP's defense to the successor liability claims pleaded against it, the other Tower Defendants' limited ability to pay, and the diminishing available insurance proceeds.

The $20.5 million Settlement eliminates these risks and provides a certain and immediate cash recovery for the Settlement Classes. In light of the obstacles to recovery against the Tower Defendants, and the substantial time and expense that continued litigation would require, the Settlement is a very good result for the Settlement Classes, and provides a fair and reasonable resolution of the claims.

Lead Plaintiffs also request that the Court approve the proposed Plan of Allocation for the Settlement proceeds. The Plan of Allocation will govern how members of Settlement Classes' claims will be calculated and, ultimately, how money will be distributed to valid claimants. The Plan of Allocation was prepared with the assistance of Lead Plaintiffs' damages consultant and is based primarily on the expert's event study analysis estimating the amount of artificial inflation in the prices of Tower common stock during the Settlement Class Period. *See* Declaration of Chad Coffman, CFA ("Coffman Decl."), attached as Exhibit 3 to the Lead Counsel Decl. It is substantively the same as plans that have been approved and successfully used to allocate recoveries in other securities class actions. The Plan of Allocation is fair, reasonable and adequate and should be approved.

II. ARGUMENT

A. The Proposed Settlement Warrants Final Approval

Under Fed. R. Civ. P. 23(e), a class action settlement should be approved if the Court finds it "fair, reasonable, and adequate." "A court determines a settlement's fairness by looking at both the settlement's terms and the negotiating process leading to settlement." *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 116 (2d Cir. 2005); *see also D'Amato v. Deutsche Bank*, 236 F.3d 78, 85 (2d Cir. 2001) ("The District Court must carefully scrutinize the settlement to ensure its fairness, adequacy and reasonableness, and that it was not a product of collusion."). In this Circuit, public policy favors the settlement of disputed claims among private litigants, particularly in complex class actions such as this one. *Wal-Mart*, 396 F.3d at 116 ("We are mindful of the 'strong judicial policy in favor of settlements, particularly in the class action context.'"); *Chavarria v. N.Y. Airport Serv., LLC*, 875 F. Supp. 2d 164, 171 (E.D.N.Y. 2012) ("Settlement approval is within the Court's discretion, which 'should be exercised in light of the general judicial policy favoring settlement.'"). As this Court has explained, "Courts examine procedural and substantive fairness in light of the 'strong judicial policy favoring settlements' of class action suits.'" *Flores v. Anjost Corp.*, No. 11 Civ. 1531, 2014 WL 321831, at *4 (S.D.N.Y. Jan. 29, 2014) (Torres, J.) (quoting *Wal-Mart*, 396 F.3d at 116).

Recognizing that a settlement represents an exercise of judgment by the negotiating parties, the Second Circuit has cautioned that, while a court should not give rubber stamp approval to a proposed settlement, it should "stop short of the detailed and thorough investigation that it would undertake if it were actually trying the case." *Detroit v. Grinnell Corp.*, 495 F.2d 448, 462 (2d Cir. 1974), *abrogated on other grounds by, Goldberger v. Integrated Res., Inc.*, 209 F.3d 43 (2d Cir. 2000). Because "'[t]he very purpose of a compromise is to avoid the trial of sharply disputed issues and to dispense with wasteful litigation,' the court must not turn the settlement hearing 'into a trial or a rehearsal of the trial.'" *Newman v. Stein*, 464 F.2d 689, 691-92 (2d Cir. 1972); *see Chavarria*, 875 F. Supp. 2d at 172 (a court may not "conduct a mini-trial of the merits of the action."); *In re Marsh ERISA Litig.*, 265 F.R.D. 128, 138 (S.D.N.Y. 2010) ("In deciding whether

to approve a settlement, a court 'should not attempt to approximate a litigated determination of the merits of the case lest the process of determining whether to approve a settlement simply substitute[s] one complex, time consuming and expensive litigation for another.'").

1. The Settlement Was Reached After Arm's-Length Negotiations With The Assistance Of An Experienced Mediator And Is Procedurally Fair

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 the recommendations of counsel, who are closely acquainted with the facts of the underlying litigation. *See In re Luxottica Grp. S.p.A. Sec. Litig.*, 233 F.R.D. 306, 315 (E.D.N.Y. 2006). A court may find the negotiating process is fair where, as here "the settlement resulted from arm's-length negotiations and that plaintiffs' counsel have possessed the experience and ability . . . necessary to effective representation of the class's interests." *D'Amato*, 236 F.3d at 85; *In re China Sunergy Sec. Litig.*, 2011 WL 1899715, at **3-4 (S.D.N.Y. May 13, 2011); *In re PaineWebber Ltd. P'ships Litig.*, 171 F.R.D. 104, 125 (S.D.N.Y. 1997) ("So long as the integrity of the arm's length negotiation process is preserved . . . a strong initial presumption of fairness attaches to the proposed settlement."), *aff'd*, 117 F.3d 721 (2d Cir. 1997).

The initial presumption of fairness and adequacy applies here because all of the settling parties are represented by counsel with extensive experience litigating these types of claims (Lead Counsel Decl. ¶¶83-84); the Settlement was the result of intense, arm's-length negotiations (*id.* Section III.A.; Mediator Decl.); and the parties understood the strengths and weaknesses of the claims and defenses before the Settlement was reached (Lead Counsel Decl. Section III.B.).

Jed Melnick, Esq., an experienced mediator who oversaw the mediation and made the double-blind recommendation that the claims against the Tower Defendants be settled for $20.5 million, states that the Settlement was achieved "after a rigorous mediation process and hard-fought litigation," and "represents a well-reasoned and sound resolution of the complicated and uncertain legal claims brought against the Tower Defendants." Mediator Decl., Ex. 5, ¶2. The active involvement of an experienced independent mediator is strong evidence of the absence of

collusion and further supports the presumption of fairness. *See D'Amato*, 236 F.3d at 85 (a mediator's involvement in settlement negotiations "helps to ensure that the proceedings were free of collusion and undue pressure"); *In re Par Pharmaceuticals Sec. Litig.*, Case No. 06-3226 (ES), slip op. (D.N.J. July 29, 2013) (granting final approval of settlement resulting from mediation with Jed Melnick); *In re American Apparel, Inc. Shareholder Litig.*, Case No. CV 10-06352 MMM, slip op., at *8 (C.D. Cal. July 28, 2014) (finding that fact that settlement was reached with the assistance of experienced mediator, Jed Melnick, supported final approval; granting final approval of settlement following Mr. Melnick's mediator's proposal); *In re MRV Commc'ns, Inc. Derivative Litig.*, 2013 WL 2897874, at *5 (C.D. Cal. June 6, 2013) (approving settlement mediated by Mr. Melnick, finding that there was "every indication that the negotiations and mediation were conducted at arm's length and were in no way collusive").

2. Application Of The *Grinnell* Factors Supports Approval Of The Settlement As Fair, Reasonable, And Adequate

This Settlement is also substantively fair, reasonable and adequate and in the best interests of the Settlement Classes. In the Second Circuit, the following factors are to be considered in evaluating a class action settlement:

> (1) the complexity, expense and likely duration of the litigation, (2) the reaction of the class to the settlement, (3) the stage of the proceedings and the amount of discovery completed, (4) the risks of establishing liability, (5) the risks of establishing damages, (6) the risks of maintaining the class action through the trial, (7) the ability of the defendants to withstand a greater judgment, (8) the range of reasonableness of the settlement fund in light of the best possible recovery, [and] (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.

Grinnell, 495 F.2d at 463 (internal citations omitted); *see also McReynolds v. Richards-Cantave*, 588 F.3d 790, 804 (2d Cir. 2009); *Wal-Mart*, 396 F.3d at 117. "A court need not find that every factor militates in favor of a finding of fairness; rather, a court considers the totality of these factors in light of the particular circumstances." *Padro v. Astrue,* 2013 WL 5719076, at *4 (E.D.N.Y. Oct. 18, 2013) (citation omitted). Here, the Settlement easily satisfies the *Grinnell* factors.

a) The Complexity, Expense And Likely Duration Of The Litigation Supports Approval Of The Settlement

"In evaluating the settlement of a securities class action, federal courts, including this Court, have long recognized that such litigation is notably difficult and notoriously uncertain." *In re IMAX Sec. Litig.*, 283 F.R.D. 178, 189 (S.D.N.Y. 2012) (citation omitted). Indeed, courts recognize that "[s]ecurities class actions are generally complex and expensive to prosecute." *In re Gilat Satellite Networks, Ltd.*, 2007 WL 1191048, at *10 (E.D.N.Y. Apr. 19, 2007). Accordingly, "[c]lass action suits readily lend themselves to compromise because of the difficulties of proof, the uncertainties of the outcome, and the typical length of the litigation." *Luxottica*, 233 F.R.D. at 310.

This is a case with a complex fact pattern, a nearly four year class period and challenging issues involving insurance loss reserves, internal controls, and accounting. Litigation of the claims against the Tower Defendants raised many complex issues, as is evidenced by the over 900 pages of briefing and exhibits dedicated to addressing the Tower Defendants' multiple arguments in their motion to dismiss. The litigation also raised a number of complex questions that required substantial efforts by Lead Counsel, often through analysis of the factual record and consultation with economic and foreign law experts. Lead Counsel's consultation with experts was necessarily extensive given the complex nature of the subject matter underlying the claims. Lead Counsel undertook to create a compelling record addressing these and other complicated issues. Lead Counsel Decl. Section II.

Lead Plaintiffs would have had to overcome numerous hurdles in order to achieve a litigated verdict in this Action against the Tower Defendants. Even assuming that Lead Plaintiffs were successful in the pending motion to dismiss, and that Lead Plaintiffs' claims on behalf of certified litigation classes survived summary judgment, a jury trial would have required a substantial amount of factual and expert testimony. Whatever the outcome at trial, it is virtually certain that an appeal would be taken. All of the foregoing would have posed considerable expense to the Settling Parties – with the Tower Defendants' expenses to be paid from the vanishing available insurance proceeds – and would have delayed the Settlement Classes' potential recovery

for several years, assuming that Lead Plaintiffs were ultimately successful on the claims. Accordingly, the complexity, expense and likely duration of the litigation support approval of the Settlement as fair and reasonable.

b) The Reaction Of The Settlement Classes Supports Approval Of The Settlement

"It is well-settled that the reaction of the class to the settlement is perhaps the most significant factor to be weighed in considering its adequacy." *See, e.g., Chavarria*, 875 F. Supp. 2d at 173; *see also Padro*, 2013 WL 5719076, at *5 ("The fact that a small number of objections were received weighs in favor of settlement," as does "the positive reaction of the class, particularly in light of its size."). Pursuant to the Court's Preliminary Approval Order, the Court-approved Claims Administrator, A.B. Data Ltd. ("A.B. Data"), began mailing copies of the Notice to potential members of the Settlement Classes and their nominees on August 27, 2015 (the "Notice Date"). *See* Declaration of Adam D. Walter Re Notice Dissemination and Publication ("Walter Decl."), attached to Lead Counsel Decl. at Exhibit 2. As of October 7, 2015, over 47,000 copies of the Notice had been disseminated to potential members of the Settlement Classes and their nominees. *Id.* ¶8. In addition, the Summary Notice was published in the *Investor's Business Daily* and over the *PR Newswire* on September 2, 2015, and September 3, 2015, respectively, *id.* ¶9, and the Notice and related settlement documents are available on the website specifically created for the Settlement, as well as Lead Counsel's websites, *id.* ¶12. Lead Counsel Decl. ¶51.

The Notice sets out the essential terms of the Settlement and informed potential members of the Settlement Classes of, among other things, their right to opt out of the Settlement Classes or object to any aspect of the Settlement, as well as the procedure for submitting Claim Forms. While the deadline set by the Court for members of the Settlement Classes to opt out or object to the

Settlement has not yet passed, to date, Lead Counsel has received no objections to any aspect of the Settlement and no requests for exclusion.[3]

c) The Stage Of The Proceedings And The Amount Of Information Obtained Support Approval Of The Settlement

"Under this factor the relevant inquiry 'is whether the plaintiffs have obtained a sufficient understanding of the case to gauge the strengths and weaknesses of their claims and the adequacy of the settlement.'" *In re Sinus Buster Prods. Consumer Litig.,* 2014 WL 5819921, at *9 (E.D.N.Y. Nov. 10, 2014) (quoting *In re AOL Time Warner, Inc. Sec. & ERISA Litig.,* 2006 WL 903236, at *10 (S.D.N.Y. Apr. 6, 2006)). "The parties 'need not have engaged in extensive discovery as long as they have engaged in sufficient investigation of the facts to enable the Court to 'intelligently make an appraisal' of the settlement.'" *Id.* (quoting *AOL*; *In re Austrian & German Bank Holocaust Litig*., 80 F. Supp. 2d 164, 176 (S.D.N.Y. 2000)); *see also In re Nissan Radiator/Transmission Cooler Litig*., 2013 WL 4080946, at *7 (S.D.N.Y. May 30, 2013) (finding the factor to weigh in favor of approval even where "the parties have not engaged in extensive discovery" but after "plaintiffs conducted an investigation prior to commencing the action" and also consulted with experts concerning their claims). Here, the successful resolution of the claims against the Tower Defendants occurred after two years of litigation. As set forth in greater detail in the Lead Counsel Declaration, Lead Counsel extensively developed the record by, among other things:

- Performing an in-depth review and analysis of (a) Tower's SEC filings; (b) research reports by securities and financial analysts; (c) transcripts of Tower's earnings conference calls and industry conferences; (d) publicly available presentations by Tower; (e) Tower's press releases; (f) news and media reports concerning Tower and other facts related to this action; (g) data reflecting the pricing of Tower common stock; (h) materials obtained through freedom of information requests to

[3] The deadline for submitting objections and opt out requests, if any, is October 28, 2015, which is twenty-one days prior to the date initially set for the Settlement Hearing, November 18, 2015. In any event, if any objections or opt-out requests are received either before or after that deadline, they will be addressed in Lead Plaintiffs' reply papers to be filed one week prior to the Settlement Hearing.

various of Tower's regulators; and (i) private placement materials sent to members of the Settlement PPC in connection with the March 7, 2013 private placement in conjunction with the merger between Canopius and Tower Group, Inc., Lead Counsel Decl. ¶27);

- Conducting a thorough investigation identifying and interviewing potential percipient witnesses, including the twelve witnesses with direct knowledge as alleged in the Complaint (*id*. ¶28);

- Conferring extensively with experts and consultants concerning the specialized areas of accounting for loss reserves, actuarial processes, loss causation and damages, and foreign law (*id*. ¶¶27, 30);

- Drafting detailed complaints, including the 156-page Amended Complaint based on Lead Counsel's extensive factual investigation and legal research into the applicable claims (*id*. ¶¶16, 17, 19);

- Preparing extensive briefing, and supplemental briefing, in response to motions to dismiss the Complaint, including in response to the Tower Defendants' argument that ACP was not liable on a successor liability theory (*id*. ¶¶18, 19, 21-24);

- Obtaining and analyzing information demonstrating the Tower Defendants' limited ability to pay a substantial judgment (*id.* ¶34); and

- Drafting Lead Plaintiffs' mediation statement and supplemental statements, and analyzing the Tower Defendants' mediation statement, and preparing for and participating in the mediation process, including a full-day mediation session held at JAMS (*id*. ¶¶32-35).

Thus, at the time the Settlement was reached, Lead Plaintiffs "obtained sufficient information to be able to intelligently assess the strengths and weaknesses of the case and appraise settlement proposals." *Padro*, 2013 WL 5719076, at *6. As a result, they had a well-informed basis for their belief that the Settlement – proposed by a well-respected and experienced mediator – is a favorable resolution for the Settlement Classes, and this factor strongly supports approval of the Settlement.

d) The Risks Of Establishing Liability And Damages Support Approval Of The Settlement

Grinnell requires that, in assessing the fairness, reasonableness and adequacy of a settlement, courts should consider such factors as the "risks of establishing liability [and] . . . the risks of establishing damages." 495 F.2d at 463. The underlying facts in the case involved dense

and highly specialized factual questions concerning insurance loss reserves, financial accounting and internal disclosure controls. While Lead Plaintiffs believe that the claims have merit, they also recognize that, in addition to the very real limitations on the ability to recover from the Tower Defendants, there were also significant risks as to whether they would ultimately be able to prove liability and establish damages, as well as with respect to the amount of damages that Lead Plaintiffs could establish. Lead Plaintiffs recognize that the Tower Defendants argued in their motion to dismiss, among other things, that: Tower's loss reserves are inherently forward-looking statements of opinion; that Tower's reserve increases are distinct from its restatement; that the Tower Defendants did not act with scienter, in part, because Tower's reserves were approved by its auditor at the time, PwC (whose claims have since been dismissed for insufficiently pleading scienter); that the loss reserves and related disclosures are not actionable false statements; and that the Complaint's loss causation allegations are inadequate.

Tower further argued, among other things, that the claims asserted by the Settlement PPC were precluded by SLUSA, were barred by the statute of limitations, and insufficiently pleaded actual reliance for certain claims.

Several of these contested issues, including loss causation, would ultimately have required expert testimony before the jury. While Lead Plaintiffs expected to present persuasive testimony establishing causation and damages, the Tower Defendants likely would have presented experts in support of their positions. Defendants, moreover, undoubtedly would assert *Daubert* challenges as to each of Lead Plaintiffs' experts. Assuming that Lead Plaintiffs prevailed in such challenges, Lead Plaintiffs could not be certain which experts' views would be credited by the jury, particularly given the complexity of the underlying factual issues, and who would prevail at trial in this "battle of the experts." *See, e.g., In re Metlife Demutualization Litig.*, 689 F. Supp. 2d 297, 332 (E.D.N.Y. 2010) ("The proof on many disputed issues – which involve complex financial concepts – would likely have included a battle of experts, leaving the trier of fact with difficult questions to resolve."); *In re Am. Bank Note Holographics, Inc. Sec. Litig.*, 127 F. Supp. 2d 418, 426-27 (S.D.N.Y. 2001) ("In such a battle, Plaintiffs' Counsel recognize the possibility that a jury could

be swayed by experts for Defendants."). The Settlement enables the Settlement Classes to recover a substantial sum of money, while avoiding continued protracted litigation, significant challenges, and depleting available insurance proceeds. In light of all of these risks, the proposed Settlement is fair, reasonable and adequate.

e) The Risks Of Maintaining The Class Action Through Trial Supports Approval Of The Settlement

Even assuming that Lead Plaintiffs survived the Tower Defendants' motion to dismiss, the Tower Defendants undoubtedly would have challenged certification of the classes for litigation purposes. Even if Lead Plaintiffs were successful in getting one or both of the classes certified for litigation purposes, there was no guarantee that they would be able to maintain them because courts may always exercise their discretion to re-evaluate the appropriateness of class certification at any time. The Settlement avoids any uncertainty with respect to this issue, which militates in favor of approval. *See, e.g., Charron v. Wiener*, 731 F.3d 241, 249 (2d Cir. 2013) ("[W]e cannot find that the district court abused its discretion in finding that the class faced significant risks of decertification, that decertification would drastically reduce the chances of any member of the class achieving meaningful relief, and that the litigation risks attendant to these possibilities weighed heavily in favor of the fairness of a settlement.").

f) The Inability Of The Tower Defendants To Withstand A Greater Judgment Supports Approval Of The Settlement

The Tower Defendants' inability to withstand a substantial judgment, combined with the parties' disputed arguments regarding ACP's successor liability, and the diminishing available insurance proceeds, were primary driving factors considered by Lead Plaintiffs and Lead Counsel in accepting the mediator's proposal to resolve the claims for $20.5 million. *See China Sunergy*, 2011 WL 1899715, at *5 (recognizing that where defendant company was under tremendous financial pressure, and there was a likelihood that the company would not withstand a greater judgment at trial, the potential for any recovery was severely eroded); *In re Global Crossing Sec. and ERISA Litig.*, 225 F.R.D. 436, 456-57 (S.D.N.Y. 2004) (recognizing that "protracted litigation could deprive the class members of the substantial amount of insurance money the partial

settlement would provide," and that the settlement "would maximize the recovery of insurance money for the class."); *Torrisi v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1376 (9th Cir. 1993) (the deteriorating financial condition of the company defendant was the "predominat[ing]" factor supporting the reasonableness of the settlement).

The claims in the Action were initiated in August 2013. At that time, Tower had begun to announce the problems that form the basis for the claims, but its stock was still trading at over $16 per share. Over the ensuing months the full extent of Tower's problems became known, reflecting that Tower's loss reserves were allegedly understated by over $500 million. Tower's need to suddenly increase its loss reserves by such an astounding amount crushed the Company's share price, set-off a liquidity crisis, caused various state insurance regulators to restrict Tower's use of capital, and forced it into a fire-sale merger with ACP. That merger transaction closed at $2.50 per share in September 2014. As one example of Tower's financial deterioration, in connection with the ACP Merger, Tower's own financial advisors issued a fairness opinion that the Company's shares had "negative" value. Lead Counsel expect that, had ACP not acquired Tower, Tower's insurance entities would likely be placed into conservatorship. Lead Counsel Decl. ¶46.

While Lead Plaintiffs brought claims against ACP on a successor liability theory, ACP argued for dismissal of those claims because the Tower corporate entity "survived" the merger for legal purposes. Further, the given its financial condition at the time it was acquired by ACP, the surviving Tower entity apparently does not have the financial ability to meaningfully fund a settlement or judgment. In addition, based on gathering certain publicly available information concerning compensation and shareholdings, Lead Counsel determined that neither of the individual defendants likely has sufficient, liquid assets to materially fund a settlement or judgment. *Id.* ¶47.

Given these constraints, Lead Counsel understood that the Settlement Classes' source of recovery from the Tower Defendants was limited to proceeds from the available insurance policies in place. As the litigation progressed, the Tower Defendants' attorneys' fees and litigation

expenses increased in this and other litigation, and therefore the amount available for any potential recovery was greatly reduced. Lead Plaintiffs and Lead Counsel, therefore, understood there was a serious risk that there would be little or nothing remaining to fund any future settlement or litigated judgment against the Tower Defendants. *Id.* ¶48. Thus, this factor weighs in favor of final approval of the Settlement.

g) The Range Of Reasonableness Of The Settlement Amount, In Light Of The Best Possible Recovery And All Of The Attendant Risks Of Litigation, Supports Approval Of The Settlement

The last two substantive factors that courts consider are the range of reasonableness of the settlement fund in light of (i) the best possible recovery and (ii) litigation risks. In analyzing these two factors, the issue for courts is not whether the settlement represents the best possible recovery, but how the settlement relates to the strengths and weaknesses of the case. A court "consider[s] and weigh[s] the nature of the claim, the possible defenses, the situation of the parties, and the exercise of business judgment in determining whether the proposed settlement is reasonable." *Grinnell*, 495 F.2d at 462 (citations omitted).

The Second Circuit has described the "range of reasonableness" as "a range which recognizes the uncertainties of law and fact in any particular case and the concomitant risks and costs necessarily inherent in . . . any litigation." *Wal-Mart Stores*, 396 F.3d at 119 (quoting *Newman*, 464 F.2d at 693). "The determination of a reasonable settlement 'is not susceptible of a mathematical equation yielding a particularized sum,' but turns on whether the settlement falls within a range of reasonableness." *Chavarria*, 875 F. Supp. 2d at 174 (citation omitted). "The fact that a proposed settlement may only amount to a fraction of the potential recovery does not, in and of itself, mean that the proposed settlement is grossly inadequate and should be disapproved." *Grinnell*, 495 F.2d at 455. "In fact, there is no reason, at least in theory, why a satisfactory settlement could not amount to a hundredth or even a thousandth part of a single percent of a potential recovery." *Chavarria*, 875 F. Supp. 2d at 175 (citation omitted).

The Settlement here is well within the range of reasonableness in light of the substantial risks presented by this litigation. Estimating aggregate damages can be challenging due to assumptions that must be made regarding trading activity. Here, such estimates of potential maximum recoverable damages against the Tower Defendants, before taking into account their causation arguments and other defenses, exceeded several hundred million dollars, depending on the assumptions used. However, damages may be reduced or eliminated if the jury finds that a portion or all of the losses are attributable to causes other than the alleged misstatements or omissions. Lead Counsel Decl. ¶45.

At bottom, the proposed recovery is an excellent result for the Settlement Classes in light of the attendant risks of continued litigation. In accepting the mediator's proposal and reaching the Settlement with the Tower Defendants, Lead Plaintiffs understood that, particularly in this context, where the only real potential source of a significant recovery was diminishing insurance proceeds, "[a] very large bird in the hand in this litigation is surely worth more than whatever birds are lurking in the bushes." *In re Chambers Dev. Sec. Litig.*, 912 F. Supp. 822, 838 (W.D. Pa. 1995).

Moreover, a court may not "substitute its judgment for that of the parties who negotiated the settlement." *Chavarria*, 875 F. Supp. 2d at 172. Lead Counsel are ultimately familiar with the facts of the case and have extensive experience prosecuting comparable securities class actions. In these circumstances, Lead Counsel's opinion that the Settlement is reasonable is entitled to "great weight." *Padro*, 2013 WL 5719076, at *7 ("Where, as here, settlement has been reached after an arms-length negotiation, 'great weight is accorded to the recommendations of counsel, who are most closely acquainted with the facts of the underlying litigation.'") (citation omitted). The recommendation of Lead Plaintiffs, sophisticated institutional investors, also strongly supports the fairness of the Settlement. Representatives of Lead Plaintiffs took an active role in supervising the litigation and the mediation process, as envisioned by the PSLRA, and Lead Plaintiffs endorse the Settlement. *See* Lead Plaintiff Decls, attached to Lead Counsel Decl. as Exhibits 1A-1D. A settlement reached "under the supervision and with the endorsement of a

sophisticated institutional investor . . . is 'entitled to an even greater presumption of reasonableness.'" *In re Veeco Instruments Inc. Sec. Litig.*, 2007 WL 4115809, at *5 (S.D.N.Y. Nov. 7, 2007) (citation omitted). In sum, a review of the *Grinnell* factors strongly supports a finding that the Settlement is fair, reasonable and adequate.

B. The Plan Of Allocation Is Fair, Reasonable, And Adequate

The standard for approval of a plan of allocation is the same as the standard for approving the settlement as a whole: "'namely, it must be fair and adequate.'" *Maley v. Del Global Techs. Corp.*, 186 F. Supp. 2d 358, 367 (S.D.N.Y. 2002); *In re WorldCom, Inc. Sec. Litig.*, 388 F. Supp. 2d 319, 344 (S.D.N.Y. 2005). "'As a general rule, the adequacy of an allocation plan turns on . . . whether the proposed apportionment is fair and reasonable' under the particular circumstances of the case." *In re Visa Check/Mastermoney Antitrust Litig.*, 297 F. Supp. 2d 503, 518 (E.D.N.Y. 2003), *aff'd sub nom., Wal-Mart*, 396 F.3d 96. A plan of allocation "need only have a reasonable, rational basis, particularly if recommended by 'experienced and competent' class counsel." *Am. Bank Note*, 127 F. Supp. 2d at 429-30; *see also WorldCom*, 388 F. Supp. 2d at 344. Further, courts enjoy "broad supervisory powers over the administration of class-action settlements to allocate the proceeds among the claiming class members . . . equitably." *Beecher v. Able*, 575 F.2d 1010, 1016 (2d Cir. 1978).

Here, the Plan of Allocation, which was fully described in the Notice, has a rational basis and was formulated by Lead Counsel in consultation with Lead Plaintiffs' damages consultant, ensuring its fairness and reliability. *See Veeco*, 2007 WL 4115809, at *13. Under the proposed Plan of Allocation, each Authorized Claimant will receive a *pro rata* share of the Net Settlement Fund, with that share to be determined by the ratio that the Authorized Claimant's allowed claim bears to the total allowed claims of all Authorized Claimants. *See* Coffman Decl., attached as Exhibit 3 to the Lead Counsel Decl.

The Plan determines the Authorized Claimants' claim amount principally based on Lead Plaintiffs' expert's calculation of the amount of estimated alleged artificial inflation in the per share closing price of the Tower securities that allegedly was proximately caused by the Tower

Defendants' alleged false and misleading statements and material omissions. In doing that calculation, Lead Plaintiffs' expert performed an event study and considered price changes in the Tower Securities in reaction to certain public announcements regarding Tower in which such misrepresentations and material omissions were alleged to have been revealed to the market, adjusting for price changes that were attributable to market or industry forces. *Id.* The amount of an Authorized Claimant's claim will depend on several factors, including, when and at what price the security was purchased or acquired; whether it was sold, and if so, when and at what price it was sold; and whether the security was purchased or acquired on the open market or in the private placement (*i.e.*, whether the Claimant, for purposes of its particular transaction, is treated as a member of the Settlement Class or the Settlement PPC).[4]

It is appropriate for interclass distributions to be based upon, among other things, the relative strengths and weaknesses of class members' individual claims. *See, e.g., Holocaust Victim Assets Litig.*, 413 F.3d 183, 186 (2d Cir. 2001). Here, for example, to account for the higher degree of litigation risk associated with the Settlement PPC's claims, particularly as to the risks related to class certification, the Plan of Allocation applies a 10% discount to the value of those claims. *See, e.g., Am. Bank* Note, 127 F. Supp. 2d at 429 ("Allocation formulas, including certain discounts for

[4] The Plan provides that if any Claimant's Distribution Amount calculates to less than $10.00, it will not be included in the calculation and no distribution will be made to such Claimant. The Recognized Claims of any Claimants whose Distribution Amounts would be less than $10.00 are then excluded and the total Recognized Claims of all other Claimants are totaled to determine the *pro rata* Distribution Amounts for the Authorized Claimants who will receive $10.00 or more. A $10 minimum for distribution is necessary given the administrative costs involved and to prevent depletion of the Settlement Fund to pay *de minimis* claims. Courts routinely approve settlements that require a class member's payment to exceed a minimum threshold in order to recover from a settlement fund. *See, e.g., In re Global Crossing Sec. and ERISA Litig.*, 225 F.R.D. 436, 463 (S.D.N.Y. 2004) ($10 minimum allowed); *Gilat Satellite*, 2007 WL 1191048, at *9 ("*de minimus* thresholds for payable claims are beneficial to the class as a whole since they save the settlement fund from being depleted by the administrative costs associated with claims unlikely to exceed those costs and courts have frequently approved such thresholds, often at $10."); *see also Mirfasihi v. Fleet Mortg. Corp.*, 356 F.3d 781, 783 (7th Cir. 2004) (Posner, J.) (stating that a settlement may give nothing to people with claims "worth too little to justify a distribution"); *In re Sprint Corp. ERISA Litig.*, 443 F. Supp. 2d 1249, 1268 (D. Kan. 2006) ($25 minimum allowed).

certain securities, are recognized as an appropriate means to reflect the comparative strengths and value of different categories of the claim.").

Moreover, in assessing a proposed plan of allocation, the Court may give great weight to the opinion of informed counsel. *See, e.g.*, *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 986 F. Supp. 2d 207, 240 (E.D.N.Y. 2013) ("An allocation formula need only have a reasonable, rational basis, particularly if recommended by experienced and competent class counsel."); *Chavarria*, 875 F. Supp. 2d at 175 ("In determining whether a plan of allocation is fair, courts look primarily to the opinion of counsel. That is, 'as a general rule, the adequacy of an allocation plan turns on whether counsel has properly apprised itself of the merits of all claims, and whether the proposed apportionment is fair and reasonable in light of that information.'").

Here, the Plan of Allocation was approved by the Lead Plaintiffs, was detailed in the Notice, and to date there are no objections, further supporting its approval. *See Veeco*, 2007 WL 4115809, at *14; *Maley*, 186 F. Supp. 2d at 367.

C. Notice To The Settlement Classes Satisfied The Requirements Of Rule 23, Due Process, And The PSLRA

The Notice provided to the Settlement Classes satisfied the requirements of Rule 23(c)(2)(B), which requires "the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Fed. R. Civ. P. 23(c)(2)(B). The Notice also satisfied Rule 23(e)(1), which requires that notice of a settlement be "reasonable." Fed. R. Civ. P. 23(e)(1). Notice is reasonable if it "fairly apprise[s] the prospective members of the class of the terms of the proposed settlement and of the options that are open to them in connection with the proceedings." *Wal-Mart*, 396 F.3d at 114.

Both the substance of the Notice and the method of its dissemination to potential members of the Settlement Classes satisfied these standards. *See In re Bank of Am. Corp. Sec., Derivative and ERISA Litig.*, 772 F.3d 125, 133 n.5 (2d Cir. 2014) (affirming sufficiency of similar notice plan). As noted above, in accordance with the Court's Preliminary Approval Order, as of October 7, 2015, the Claims Administrator has sent more than 47,000 copies of the Notice to

potential members of the Settlement Classes and their nominees. *See* Walter Decl. ¶8. The Claims Administrator utilized several resources of data to reasonably identify potential members of the Settlement Classes. For example, paragraph 19 of the Stipulation required the Tower Defendants to provide information identifying the holders of Tower common stock during the Settlement Class Period and those who acquired Canopius shares in the March 7, 2013 private placement. *Id.* ¶3.

In addition, A.B. Data sent the Notice to entities identified on a proprietary list maintained by A.B. Data of the largest and most common banks, brokers, and other nominees, and the Depository Trust Company, which acts as a clearinghouse to process and settle trades in securities. *Id.* ¶4. The Notice requires brokers and nominees, within seven days, to either (i) request additional copies of the Notice to send to the beneficial owners of the securities, or (ii) provide to A.B. Data the names and addresses of such persons. *Id.* ¶6.

Lead Plaintiffs also caused the Summary Notice to be published in the *Investor's Business Daily* and over the *PR Newswire*, and copies of the Notice were made available on a dedicated website maintained by the Claims Administrator and on Lead Counsel's websites. *Id.* ¶9; Lead Counsel Decl. ¶51.[5]

This combination of individual mail to all members of the Settlement Classes who could be identified with reasonable effort, supplemented by notice in appropriate, widely-circulated publications, and set forth on Internet websites, was "the best notice . . . practicable under the

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[5] By Order dated September 10, 2015, the Court rescheduled the hearing for November 23, 2015, at 4:15 p.m. ET. ECF No. 154. The Notice provides that the hearing "may be adjourned by the Court without further written notice to the Settlement Classes, except that notice of any adjournment will be posted on the Settlement website, www.TowerSecuritiesSettlement.com." The Notice further instructs that any potential member of the Settlement Classes who wishes to be heard orally at the hearing must file a notice of appearance no later than October 28, 2015, and that he or she should confirm the date and time with Lead Counsel. Following the Court's rescheduling of the hearing, notice of the rescheduled hearing was posted on the Settlement website, *see* Walter Decl. ¶14, and on Lead Counsel's websites. In addition, the Claims Administrator reprinted the Notice with the updated hearing date for any new mailings to potential members of the Settlement Classes. To date, Lead Counsel is not aware of any potential members of the Settlement Classes, other than representatives of the Lead Plaintiffs, that have expressed an intention to attend the hearing. Lead Counsel Decl. ¶53.

circumstances" and satisfies the requirements of due process, Rule 23, and the PSLRA. Fed. R. Civ. P. 23(c)(2)(B); *see, e.g.*, *Padro*, 2013 WL 5719076, at *3 ("Notice need not be perfect, but need be only the best notice practicable under the circumstances, and each and every class member need not receive actual notice, so long as class counsel acted reasonably in choosing the means likely to inform potential class members."); *see also Arace v. Thompson*, 2011 WL 3627716, at *4 (S.D.N.Y. Aug. 17, 2011) (describing *Investor's Business Daily* as "a nationally-circulated business-oriented publication catering to investors," and finding notice of settlement published therein "sufficient[] [to] apprise[] . . . shareholders of the nature of the proposed settlement").

D. Certification Of The Settlement Classes Remains Warranted

On August 13, 2015, the Court granted Lead Plaintiffs' motion for preliminary approval of the Settlement and preliminarily certified the Settlement Classes for settlement purposes only, pursuant to Rules 23(a) and (b)(3) of the Federal Rules of Civil Procedure. Nothing has changed to alter the propriety of certification for settlement purposes and, for all the reasons stated in Lead Plaintiffs' preliminary approval brief (ECF No. 147), Lead Plaintiffs request that the Court grant final certification of the Settlement Classes pursuant to Rules 23(a) and (b)(3).

III. CONCLUSION

Lead Plaintiffs respectfully request that the Court approve the proposed Settlement and Plan of Allocation as fair, reasonable, and adequate. Particularly in the circumstances present here – where Lead Plaintiffs faced significant risk in pleading and proving claims and damages, and even if successful, in actually recovering a significant amount from the Tower Defendants after a trial verdict – the $20.5 million certain and immediate recovery is an excellent result for the Settlement Classes.

Dated: October 14, 2015
New York, New York

Respectfully submitted,

BERNSTEIN LITOWITZ BERGER & GROSSMANN LLP

By: s/ James A. Harrod

James A. Harrod
Niki L. Mendoza (*pro hac vice* pending)
1285 Avenue of the Americas
New York, New York 10019
Telephone: (212) 554-1400
Facsimile: (212) 554-1444

Counsel for Lead Plaintiffs Kansas City, Missouri Employees' Retirement System, Jacksonville Police and Fire Pension Fund, and Oklahoma Firefighters Pension & Retirement System and Lead Counsel for the Settlement Class

-and-

SAXENA WHITE P.A.
Maya Saxena
Joseph E. White, III
5200 Town Center Circle, Suite 601
Boca Raton, FL 33486
Telephone: (561) 394-3399
Facsimile: (561) 394-3382

Counsel for Lead Plaintiffs Kansas City, Missouri Employees' Retirement System, Jacksonville Police and Fire Pension Fund, and Oklahoma Firefighters Pension & Retirement System and Lead Counsel for the Settlement Class

-and-

BERNSTEIN LIEBHARD LLP
U. Seth Ottensoser
Joseph R. Seidman, Jr.
Laurence J. Hasson
10 East 40th Street
New York, New York 10016
Telephone: (212) 779-1414
Facsimile: (212) 779-3218

Counsel for Lead Plaintiffs ADAR Enhanced Investment Fund, Ltd. and ADAR Investment Fund, Ltd. and Lead Counsel for the Settlement Classes