UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE VIRTUS INVESTMENT PARTNERS, INC. SECURITIES LITIGATION	Case No. 15-cv-1249 (WHP)

MEMORANDUM OF LAW IN SUPPORT OF CLASS REPRESENTATIVE'S MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT AND APPROVAL OF PLAN OF ALLOCATION

LABATON SUCHAROW LLP

Michael H. Rogers
John J. Esmay
140 Broadway
New York, New York 10005
Tel: (212) 907-0700
Fax: (212) 818-0477
Email: mrogers@labaton.com
jesmay@labaton.com

BERNSTEIN LITOWITZ BERGER & GROSSMANN LLP

John C. Browne
Jesse L. Jensen
1251 Avenue of the Americas
New York, New York 10020
Tel: (212) 554-1400
Fax: (212) 554-1444
Email: johnb@blbglaw.com
jesse.jensen@blbglaw.com

Dated: September 19, 2018

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **Page(s)**

Statutes

Rules

Pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, Class Representative Arkansas Teacher Retirement System ("Class Representative" or "ATRS"), on behalf of itself and the other members of the certified Class, respectfully submits this memorandum of law in support of its motion for final approval of the proposed settlement, which will resolve all claims asserted in the Action in return for the payment of $22 million in cash for the benefit of the Class (the "Settlement"). Class Representative also seeks approval of the proposed plan of allocation of the proceeds of the Settlement (the "Plan of Allocation").[1]

PRELIMINARY STATEMENT

Subject to Court approval, Class Representative has agreed to settle all claims in the Action, in exchange for a cash payment of $22 million, which has been deposited into an account maintained by the Court Registry Investment System. Class Representative respectfully submits that the proposed Settlement is a very favorable result for the Class and satisfies all the standards for final approval under Rule 23 of the Federal Rules of Civil Procedure, in light of the amount of the Settlement, the substantial challenges that Class Representative would have faced in proving liability and damages, and the costs and delays of continued litigation.

The Settlement is the product of extensive arm's-length negotiations between the Parties, which included an in-person mediation session and significant follow-up discussions under the

[1] Unless otherwise noted, capitalized terms have the meanings ascribed to them in the Stipulation and Agreement of Settlement, dated May 18, 2018 (ECF No. 143-1) (the "Stipulation") or in the Joint Declaration of Michael H. Rogers and John C. Browne in Support of (I) Class Representative's Motion for Final Approval of Class Action Settlement and Approval of Plan of Allocation, and (II) Class Counsel's Motion for an Award of Attorneys' Fees and Payment of Litigation Expenses (the "Joint Declaration" or "Joint Decl."), filed herewith. Citations to "¶" in this memorandum refer to paragraphs in the Joint Declaration.

All exhibits herein are annexed to the Joint Declaration. For clarity, citations to exhibits that themselves have attached exhibits will be referenced as "Ex. ___ - ___." The first numerical reference is to the designation of the entire exhibit attached to the Joint Declaration and the second reference is to the exhibit designation within the exhibit itself.

auspices of a respected and experienced mediator, Jed D. Melnick, Esq. of JAMS.

The settlement was reached only after Class Representative and Class Counsel had a well-developed understanding of the strengths and weaknesses of the claims. Indeed, this Action was thoroughly litigated through fact and expert discovery and oral argument on summary judgment, with the Settlement being agreed to only weeks before trial was scheduled to begin. As more fully described in the Joint Declaration,[2] by the time the Settlement was agreed to, Class Counsel had, among other things: (i) conducted an extensive investigation into the alleged misconduct, which included consulting with an experienced expert, conducting 60 interviews of former Virtus employees and other potential witnesses, and reviewing the public record; (ii) drafted and filed a detailed consolidated complaint; (iii) successfully opposed Defendants' motion to dismiss; (iv) completed fact discovery, which included obtaining and analyzing more than five million pages of documents and taking or defending 16 fact depositions; (v) successfully moved for class certification, including conducting related discovery, as well as preparing for and defending a client representative in connection with his deposition; (vi) completed expert discovery, including taking and/or defending five expert depositions, and working with Class Representative's economic expert in preparing his loss causation report as well as his two rebuttal reports; (vii) fully briefed and argued Class Representative's opposition to Defendants' motion for summary judgment; and (viii) exchanged detailed mediation statements with Defendants and engaged in vigorous arm's-length settlement negotiations.

[2] The Joint Declaration is an integral part of this submission and, for the sake of brevity in this memorandum, the Court is respectfully referred to it for a detailed description of, *inter alia*: the history of the Action (¶¶ 17-107); the nature of the claims asserted (¶¶ 17-27); the negotiations leading to the Settlement (¶¶ 99-101, 107-111); the risks and uncertainties of continued litigation (¶¶ 115-131); the terms of the Plan of Allocation (¶¶ 139-146); and the services Class Counsel provided for the benefit of the Class (¶¶ 17-107, 151-154).

The Settlement is a favorable result in light of the risks of continued litigation. While Class Representative and Class Counsel believe that the claims asserted against Defendants are strong, they recognize that this Action presented a number of substantial risks, especially in light of Defendants' vigorous challenge to loss causation in their motion for summary judgment. Specifically, Defendants argued that news reports issued in December of 2013 and May of 2014 fully revealed any falsity allegedly concealed by their misstatements, yet resulted in no statistically significant decline in the price of Virtus stock (a fact that was undisputed). Accordingly, Defendants argued that the stock declines that occurred months later were not, as Class Representative contended, the result of new corrective information, but instead reflected only materializations of known risks.

While Class Representative advanced credible counterarguments, it nonetheless recognizes a substantial risk that Defendants' motion for summary judgment might be granted in part or in full and eliminate a significant portion—or even all—of the Class's damages. Even if Defendants' motion for summary judgment was unsuccessful, Defendants likely would have continued to press these arguments in *Daubert* motions, at trial, and through appeals. In light of these risks, as discussed further below and in the Joint Declaration, Class Representative respectfully submits that the Settlement is fair, reasonable, and adequate, and warrants final approval by the Court. *See* Declaration of Rod Graves, Deputy Director of Arkansas Teacher Retirement System, dated September 19, 2018, submitted herewith as Ex. 1 at ¶ 9.

Additionally, Class Representative requests that the Court approve the Plan of Allocation, which was set forth in the Settlement Notice sent to Class Members. The Plan of Allocation, which was developed by Class Counsel in consultation with Class Representative's damages expert, provides a reasonable method for allocating the Net Settlement Fund among Class

Members who submit valid claims. The Plan of Allocation is fair and reasonable, and should likewise be approved.

ARGUMENT

I. THE PROPOSED SETTLEMENT WARRANTS FINAL APPROVAL

Rule 23(e) of the Federal Rules of Civil Procedure provides that a class action settlement must be presented to the Court for approval. The Settlement should be approved if the Court finds it "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2); *see In re Citigroup Inc. Bond Litig.*, 296 F.R.D. 147, 154 (S.D.N.Y. 2013); *In re Am. Int'l Grp., Inc. Sec. Litig.*, 293 F.R.D. 459, 464 (S.D.N.Y. 2013).

Public policy favors the settlement of disputed claims among private litigants, particularly in class actions. *See Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 116 (2d Cir. 2005) ("*Visa*") ("We are mindful of the 'strong judicial policy in favor of settlements, particularly in the class action context.'") (citation omitted). In ruling on final approval of a class settlement, the court should examine both the negotiating process leading to the settlement, and the settlement's substantive terms. *See Visa*, 396 F.3d at 116; *In re Citigroup Inc. Sec. Litig.*, No. 09 MD 2070 (SHS), 2014 WL 2112136, at *2-3 (S.D.N.Y. May 20, 2014); *In re IMAX Sec. Litig.*, 283 F.R.D. 178, 188 (S.D.N.Y. 2012).

A. The Settlement Was Reached After Robust Arm's-Length Negotiations and Is Procedurally Fair

A settlement is entitled to a "presumption of fairness, adequacy, and reasonableness" when "reached in arm's length negotiations between experienced, capable counsel after meaningful discovery." *Visa*, 396 F.3d at 116; *In re Facebook, Inc. IPO Sec. & Derivative Litig.*, No. MDL 12-2389, 2015 WL 6971424, at *3 (S.D.N.Y. Nov. 9, 2015), *aff'd*, 674 F. App'x 37 (2d Cir. 2016).

The Settlement here merits such a presumption of fairness because it was achieved after both thorough arm's-length negotiations between well-informed and experienced counsel and the completion of an extensive process of fact and expert discovery, as well as other trial preparation. There can be no doubt that the Parties and their counsel were fully informed about the strengths and weaknesses of the case prior to reaching the agreement to settle. *See* ¶¶ 17-107. As a result, Class Representative and Class Counsel had a well-informed basis for assessing the strength of the Class's claims and Defendants' defenses when they agreed to settle the Action.

The decision by Class Representative and Class Counsel that the $22 million Settlement is fair and reasonable and in the best interests of the Class, further supports its approval. Class Representative is a sophisticated institutional investor that took an active role in supervising this litigation, as envisioned by the PSLRA, and strongly endorses the Settlement. *See* Joint Decl. Ex. 1. A settlement reached "with the endorsement of a sophisticated institutional investor . . . is 'entitled to an even greater presumption of reasonableness.'" *In re Veeco Instruments Inc. Sec. Litig.*, No. 05 MDL 01695 (CM), 2007 WL 4115809, at *5 (S.D.N.Y. Nov. 7, 2007).

In addition, the judgment of Class Counsel—two firms that are highly experienced in securities class action litigation—that the Settlement is in the best interests of the Class is entitled to "great weight." *City of Providence v. Aeropostale Inc. et al.*, No. 11 civ. 7132, 2014 WL 1883494, at *5 (S.D.N.Y. May 9, 2014), *aff'd*, *Arbuthnot v. Pierson*, 607 F. App'x. 73 (2d Cir. 2015); *Shapiro v. JPMorgan Chase & Co.*, No. 11 Civ. 8331, 2014 WL 1224666, at *2 (S.D.N.Y. Mar. 24, 2014); *accord In re NASDAQ Market-Makers Antitrust Litig.*, 187 F.R.D. 465, 474 (S.D.N.Y. 1998) (courts consistently give "'great weight' . . . to the recommendations of counsel, who are most closely acquainted with the facts of the underlying litigation") (citation

omitted).

B. Application of the *Grinnell* Factors Supports Approval of the Settlement as Substantively Fair, Reasonable, and Adequate

The Settlement is also substantively fair, reasonable, and adequate. The standards governing approval of class action settlements are well established in this Circuit. In *City of Detroit v. Grinnell Corp.*, the Second Circuit held that the following factors should 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.

495 F.2d 448, 463 (2d Cir. 1974) (citations omitted), *abrogated on other grounds by, Goldberger v. Integrated Res., Inc.*, 209 F.3d 43 (2d Cir. 2000), *see also Visa*, 396 F.3d at 117; *In re Advanced Battery Techs. Inc. Sec. Litig.*, 298 F.R.D. 171, 175 (S.D.N.Y. 2014); *In re Bear Stearns, Inc. Sec. Derivative & ERISA Litig.*, 909 F. Supp. 2d 259, 265-66 (S.D.N.Y. 2012).

"In finding that a settlement is fair, not every factor must weigh in favor of settlement, 'rather the court should consider the totality of these factors in light of the particular circumstances.'" *In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 456 (S.D.N.Y. 2004) (quoting *Thompson v. Metro. Life Ins. Co.*, 216 F.R.D. 55, 61 (S.D.N.Y. 2003)); *see also Advanced Battery Techs.*, 298 F.R.D. at 175 (same). Additionally, 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 one complex, time consuming and expensive litigation for another." *White v. First Am. Registry, Inc.*, No. 04 Civ. 1611 (LAK), 2007 WL 703926, at *2 (S.D.N.Y. Mar. 7, 2007).

Here, the Settlement fully satisfies the criteria for approval articulated in *Grinnell*.

1. The Complexity, Expense, and Likely Duration of the Litigation Support Approval of the Settlement

Securities class actions like this one are by their nature complicated, and district courts in this Circuit have long recognized that "[a]s a general rule, securities class actions are 'notably difficult and notoriously uncertain' to litigate." *In re Facebook,* 2015 WL 6971424, at *3; *Bear Stearns,* 909 F. Supp. 2d at 266; *In re FLAG Telecom Holdings, Ltd. Sec. Litig.*, No. 02-CV-3400 (CM)(PED), 2010 WL 4537550, at *15 (S.D.N.Y. Nov. 8, 2010) (citation omitted); *In re Gilat Satellite Networks*, *Ltd.*, No. CV-02-1510, 2007 WL 1191048, at *10 (E.D.N.Y. Apr. 19, 2007) ("Securities class actions are generally complex and expensive to prosecute.")

This case was no exception. It settled after three years of vigorous litigation and only weeks before the scheduled trial, with summary judgment motions fully briefed and argued. As discussed above and in the Joint Declaration, Defendants' summary judgment motion posed significant risks to the Class's claims and could have resulted in the case being dismissed outright or a material reduction of the Class's damages. Even if Class Representative's claims survived summary judgment, achieving a litigated verdict at trial (and sustaining any such verdict in the appeals that would inevitably ensure) would have been a very complex and risky undertaking that would have required substantial additional time and expense. *See In re Initial Pub. Offering Sec. Litig.*, 671 F. Supp. 2d 467, 481 (S.D.N.Y. 2009) (finding that the complexity, expense and duration of continued litigation supports final approval where, among other things "motions would be filed raising every possible kind of pre-trial, trial and post-trial issue conceivable").

Indeed, the trial of the Action here would have required extensive expert testimony on numerous contested issues, including materiality of the alleged misstatements, scienter with

respect to Defendant Aylward, as well as loss causation and damages. *See, e.g.*, *In re Bayer AG Sec. Litig*., No. 03 Civ. 1546, 2008 WL 5336691, at *5 (S.D.N.Y. Dec. 15, 2008) (Pauley, J.) (acknowledging the "significant litigation risks" of establishing loss causation and proving scienter and damages at trial). Courts routinely observe that these sorts of disputes—requiring dueling testimony from experts—are particularly difficult for plaintiffs to litigate. *See*, *e.g.*, *In re In re Telik, Inc. Sec. Litig.,* 576 F. Supp. 2d 570, 579-80 (S.D.N.Y. 2008) (in a "battle of experts, it is virtually impossible to predict with any certainty which testimony would be credited").

Of course, even if Class Representative had prevailed at trial, it is virtually certain that appeals would be taken, which would have, at best, substantially delayed any recovery for the Class. *See Strougo ex rel. Brazilian Equity Fund, Inc. v. Bassini*, 258 F. Supp. 2d 254, 261 (S.D.N.Y. 2003) ("[E]ven if a shareholder or class member was willing to assume all the risks of pursuing the actions through further litigation . . . the passage of time would introduce yet more risks . . . and would in light of the time value of money, make future recoveries less valuable than this current recovery."). At worst, there is always a risk that the verdict could be reversed by the trial court or on appeal. *See, e.g., Robbins v. Koger Props., Inc.*, 116 F.3d 1441, 1449 (11th Cir. 1997) (reversing $81 million jury verdict and dismissing case with prejudice in securities action); *Anixter v. Home-Stake Prod. Co.*, 77 F.3d 1215 (10th Cir. 1996) (overturning plaintiffs' verdict obtained after two decades of litigation); *cf. In re Apollo Grp., Inc. Sec. Litig.*, No. CV-04-2147-PHX-JAT, 2008 WL 3072731 (D. Ariz. Aug. 4, 2008), *rev'd*, No. 08-16971, 2010 WL 5927988 (9th Cir. June 23, 2010) (trial court overturned unanimous verdict for plaintiffs, later reinstated by the Ninth Circuit Court of Appeals, and judgment re-entered after denial of *certiorari* by the U.S. Supreme Court).

In contrast to costly, lengthy and uncertain litigation, the Settlement provides a significant and certain recovery of $22 million for members of the Class. Accordingly, this factor supports approval of the Settlement.

2. The Reaction of the Class to the Settlement

The reaction of the class to a proposed settlement is a significant factor to be weighed in considering its fairness and adequacy. *See, e.g.*, *Bear Stearns*, 909 F. Supp. 2d at 266-67; *FLAG Telecom*, 2010 WL 4537550, at *16; *Veeco*, 2007 WL 4115809, at *7.

Pursuant to the Preliminary Approval Order, the Court-appointed Claims Administrator, Garden City Group, LLC ("GCG"), began mailing copies of the Settlement Notice Packet (consisting of the Settlement Notice and Claim Form) to potential Class Members and nominees on July 27, 2018. *See* Declaration of Tara Donohue Regarding (A) Mailing of Settlement Notice and Claim Form and (B) Publication of Summary Settlement Notice, Ex. 3 to the Joint Declaration ("Donohue Decl."), at ¶¶ 3-6. As of September 18, 2018, GCG has mailed a total of 143,299 copies of the Settlement Notice Packet to potential Class Members and nominees. *See id*. ¶ 6. In addition, the Summary Settlement Notice was published in the *Wall Street Journal* and *Financial Times* and transmitted over the *PR Newswire* on August 8, 2018. *See id*. ¶ 7. The Settlement Notice set out the essential terms of the Settlement and informed potential Class Members of, among other things, their right to object to any aspect of the Settlement and Plan of Allocation, as well as the procedure for submitting Claim Forms. While the deadline set by the Court for Class Members to object to the Settlement has not yet passed, to date, no objections to the Settlement or the Plan of Allocation have been received. *See In re Warner Chilcott Ltd. Sec. Litig.*, No. 06 Civ. 11515, 2009 WL 2025160, at *2 (S.D.N.Y. July 10, 2009) (Pauley, J.) (no class member objections since preliminary approval supported final approval). The deadline for

submitting objections is October 3, 2018. As provided in the Preliminary Approval Order, Class Representative will file reply papers no later than October 17, 2018 addressing any objections.

3. The Stage of the Proceedings and the Amount of Information Available to Counsel Support Approval of the Settlement

In considering this factor, "'the question is whether the parties had adequate information about their claims, such that their counsel can intelligently evaluate the merits of plaintiff's claims, the strengths of the defenses asserted by defendants, and the value of plaintiffs' causes of action for purposes of settlement.'" *Facebook*, 2015 WL 6971424, at *4;(citation omitted) *Beckman v. KeyBank, N.A.*, 293 F.R.D. 467, 475 (S.D.N.Y. 2013) ("The pertinent question is 'whether counsel had an adequate appreciation of the merits of the case before negotiating.'" (citations omitted)).

Here, where the Action was settled just weeks before trial, after completion of all fact and expert discovery, certification of the Class, and full briefing and argument on summary judgment, there can be no question that the stage of the proceedings and amount of information available to counsel strongly support approval of the Settlement. *See Bayer*, 2009 WL 5336691, at *3 (settlement approved where lead counsel did not settle until after extensive discovery); *In re Currency Conversion Fee Antitrust Litig.*, 263 F.R.D. 110 (S.D.N.Y. 2009) (Pauley, J.) (parties "fully understood the factual landscape and the uncertainties confronting them" where parties completed discovery and had not yet filed summary judgment motions).

As noted in the Joint Declaration, Class Representative and Class Counsel had the benefit of extensive discovery, which included the receipt of more than five million pages of documents from Defendants and third parties, and had taken the depositions of 15 fact witnesses, including Virtus's senior executives, and defended the deposition of ATRS. ¶¶ 43-73. Class Counsel also consulted extensively with a very experienced economic expert while investigating and

prosecuting the Action, and, in connection with class certification and summary judgment, Class Counsel took and/or defended five expert depositions. ¶¶ 76-92.

Thus, at the time the agreement in principle to settle was reached, Class Representative and Class Counsel clearly had a "sufficient understanding of the case to gauge the strengths and weaknesses of their claims and the adequacy of the settlement." *In re AOL Time Warner, Inc. Sec. & ERISA Litig.*, No. 02 Civ. 5575 (SWK), 2006 WL 903236, at *10 (S.D.N.Y. Apr. 6, 2006).

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

In assessing the fairness, reasonableness, and adequacy of a settlement, courts should consider the "risks of establishing liability [and] the risks of establishing damages." *Grinnell*, 495 F.2d at 463 (citations omitted). As this case amply demonstrates, securities class actions present hurdles to proving liability that are difficult for plaintiffs to meet. *See AOL Time Warner*, 2006 WL 903236, at *11 (noting that "[t]he difficulty of establishing liability is a common risk of securities litigation"); *In re Alloy, Inc. Sec. Litig.*, No. 03-1597, 2004 WL 2750089, at *1 (S.D.N.Y. Dec. 2, 2004) (finding that issues present in securities action presented significant hurdles to proving liability). Class Representative and the Class faced very real risks in surmounting Defendants' motion for summary judgment and in proving both liability and damages at trial.

(a) Risks to Proving Liability

While Class Representative and Class Counsel believed and continue to believe that the claims asserted against Defendants in the Action are strong, they recognize that Defendants had meaningful defenses to liability that would have presented true obstacles. Absent the Settlement, there was a significant risk that the Court might have granted Defendants' pending motion for

summary judgment in part or in whole or that Class Representative would not be able to obtain a verdict at trial.

The principal claims in the Action are based on Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act") and Rule 10b-5 promulgated thereunder. To establish a claim under the Exchange Act, "a plaintiff must prove: (1) the defendant made a material misrepresentation or omission; (2) with scienter; (3) in connection with the purchase or sale of a security; (4) reliance; (5) economic loss; and (6) loss causation." *IBEW Local Union No. 58 Pension Trust Fund & Annuity Fund v. Royal Bank of Scotland Grp. PLC*, 783 F.3d 383, 389 (2d Cir. 2015) (citing *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 157 (2008)). Here, in particular, Defendants would have continued to vigorously challenge Class Representative's loss causation theories, arguing that much (if not all) of the decline in Virtus stock was not attributable to risks concealed by Defendants' alleged false and misleading statements and omissions – *i.e.*, Defendants' statements about the AlphaSector track record.

Specifically, Defendants argued that any alleged misrepresentations had been fully corrected by news reports published in December 2013 and May 2014 that suggested that the AlphaSector indices may have been back-tested and miscalculated, and that Virtus subadvisor F-Squared, Inc. ("F-Squared") was involved in an SEC investigation. Because these events purportedly revealed the truth months before Class Representative's alleged corrective events – and had no effect on Virtus's stock price – Defendants argued that the declines in Virtus stock price following the alleged corrective events were simply the materializations of known risks from follow-on developments as a result of the SEC investigation into F-Squared. ¶¶ 123-124.

While Class Representative had compelling counterarguments that the earlier disclosures did not fully correct the alleged fraud, the Court made clear at oral argument on Defendants'

motion for summary judgment that it was carefully and thoughtfully assessing this complicated issue with respect to each corrective disclosure. If granted, Defendants' motion would eliminate a significant portion—or even all—of the Class's potential recoverable damages. Even if Defendants' motion for summary judgment was unsuccessful, Defendants presumably would have continued to pursue this argument through attacks on Class Representative's economic expert via *Daubert* motion practice, at trial, and through appeals.

Even beyond this substantial challenge to loss causation, Defendants would hold Class Representative to its burden of proof on all other elements of securities fraud, and establishing the Class's claims would require the jury to make complicated assessments of credibility on several complex and hotly contested factual disagreements. For instance, proving securities fraud required that Class Representative demonstrate that Defendants had an intent to deceive or otherwise acted with recklessness nearing such intent. *See Telik,* 576 F. Supp. 2d at 579 ("Proving a defendant's state of mind is hard in any circumstances."). Despite having marshalled considerable evidence, Class Representative would nonetheless need to reconcile to a jury its allegations with the fact that—as admitted to the SEC and as the SEC proved in trial—the portfolio manager for the funds underlying Defendants' alleged misstatements had ***committed fraud***. Defendants would likely claim that they too were victims of that fraud, increasing the risk of a jury finding of gross negligence (or less) in this Action, which would be insufficient to support Class Representative's claims under the Exchange Act. ¶ 128.

Finally, even if Class Representative was successful at trial, many of these same arguments could have been continued on appeal, and, in the absence of any settlement, presumably would have been. Thus, there were very significant risks attendant to the continued prosecution of the Action through summary judgment, trial, and appeals, and there was no

guarantee that Defendants' liability could be established.

(b) Risks Related to Damages

Even if Defendants' liability on loss causation could be established, damages estimation remains a "complicated and uncertain process, typically involving conflicting expert opinion' about the difference between the purchase price and [share]s 'true' value absent the alleged fraud.'" *In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 459 (S.D.N.Y. 2004) (citation omitted). In order to resolve most of the disputed issues regarding loss causation and damages, among others, the Parties would have had to rely heavily on expert testimony. Though Class Representative's damages expert estimated maximum class-wide aggregate damages of approximately $275 million based on five alleged corrective events, Defendants and their expert would have made several credible arguments that the Class is unable to recover for most or even all of these events because the events did not reveal new information. ¶¶ 123-124. In Class Counsel's judgment, these arguments created a significant risk that the Class could only recover for the decline following Virtus's disclosure at the end of the Class Period that it was under investigation by the SEC—in which instance, maximum recoverable damages would be approximately $67 million, a fraction of the larger estimate. ¶ 125.

While Class Counsel had worked extensively with Class Representative's expert with a view towards presenting compelling arguments to the jury and prevailing on these matters at trial, Defendants had a well-qualified expert of their own who was likely to opine at trial that the Class suffered little or no damages. As Courts have long recognized, the substantially uncertainty as to which side's experts' view might be credited by the jury presents a substantial litigation risk. *See Currency Conversion Fee*, 263 F.R.D. at 123 (finding settlement reasonable where, among other things, "proving damages . . . would have required significant expert testimony and analysis."); *IMAX*, 283 F.R.D. at 193 ("[I]t is well established that damages calculations in

securities class actions often descend into a battle of experts."); *Telik,* 576 F. Supp. 2d at 579-80 (in this "battle of experts, it is virtually impossible to predict with any certainty which testimony would be credited, and ultimately, which damages would be found"); *In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. at 459 ("[P]roof of damages in securities cases is always difficult and invariably requires expert testimony which may, or may not be, accepted by a jury.").

Given all of these risks with respect to liability, loss causation arguments, and damages, Class Representative and Class Counsel respectfully submit that it is in the best interests of the Class to accept the certain and substantial benefit conferred by the Settlement.

5. The Risks of Maintaining Class Certification

On May 15, 2017, the Court certified the Class in the Action, over the opposition of Defendants. While Class Representative believes this Action is appropriate for class treatment, certification can be amended at any time before final judgment. *See* Fed. R. Civ. P. 23(c)(1)(C); *Annunziato v. Collecto, Inc*., 293 F.R.D. 329, 341 (E.D.N.Y. 2013) ("[U]nder rule 23, district courts have the power to amend class definitions or decertify classes as necessary….") This risk is present here, given Defendants' continued pursuit of the arguments they raised in opposition to class certification, which would provide ample opportunity for the Court to review certification. The Settlement avoids any uncertainty with respect to certification of the Class and the risks of maintaining certification of the Class through trial and on appeal support approval of the Settlement. *See Ebbert v. Nassau Cty.*, No. CV 05-5445 AKT, 2011 WL 6826121, at *12 (E.D.N.Y. Dec. 22, 2011) (risk of de-certification of the certified class supported approval of the Settlement); *Ingles v. Toro*, 438 F. Supp. 2d 203, 214 (S.D.N.Y. 2006).

6. The Ability of Defendants to Withstand a Greater Judgment

The ability of a defendant to pay a judgment greater than the amount offered in settlement is relevant to whether the settlement is fair. *Grinnell*, 495 F.2d at 463. However, even

if Defendants could withstand a greater judgment, "this factor, standing alone, does not suggest the settlement is unfair," especially where, as here, the "other Grinnell factors weigh heavily in favor of settlement." *D'Amato v. Deutsche Bank* , 236 F.3d 78, 86 (2d Cir. 2001); *see also Cavalieri v. Gen. Elec. Co*., No. 06-315, 2009 WL 2426001, at *2 (N.D.N.Y. Aug. 6, 2009) (citation omitted) ("The court also notes that although neither party contends that defendants are incapable of withstanding greater judgment, that does not 'indicate that the settlement is unreasonable or inadequate.'"); *In re Sony SXRD Rear Projection TV Class Action Litig.*, No. 06 Civ. 5173 (RPP), 2008 WL 1956267, at *8 (S.D.N.Y. May 1, 2008) ("[A] defendant is not required to 'empty its coffers' before a settlement can be found adequate[.]")(citation omitted).

Furthermore, even if Defendants could withstand a greater judgment, this prospect is offset by the risk of collection and the inevitable post-trial motions and appeals Defendants would certainly pursue following any judgment. In contrast, pursuant to the Stipulation and consistent with the Court's preferences, Defendants have already paid the $22,000,000 into the Court Registry Investment System, and the Class is already earning interest. *Prasker v. Asia Five Eight LLC*, No. 08 Civ. 5811(MGC), 2010 WL 476009, at *5 (S.D.N.Y. Jan. 6, 2010) (approving settlement and noting that "[t]he settlement eliminated the risk of collection by requiring Defendants to pay the Fund into escrow…").

7. The Range of Reasonableness of the Settlement Amount in Light of the Best Possible Recovery and all the Attendant Risks of Litigation Support Approval of the Settlement

The last two substantive factors 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 factors, the issue for the Court is not whether the settlement represents the best possible recovery, but how the settlement relates to the strengths and weaknesses of the case. The 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). Courts agree that the determination of a "reasonable" settlement "is not susceptible of a mathematical equation yielding a particularized sum." *In re PaineWebber Ltd. P'ships Litig.*, 171 F.R.D. 104, 130 (S.D.N.Y. 1997) (citation and internal quotations omitted), *aff'd*, 117 F.3d 721 (2d Cir. 1997). Instead, "in any case there is a range of reasonableness with respect to a settlement." *Newman v. Stein*, 464 F.2d 689, 693 (2d Cir. 1972).

Here, according to analyses prepared by Class Representative's damages expert, the Settlement represents a recovery of approximately 8% of estimated maximum damages of approximately $275 million, under a best case scenario where a jury credited ***all*** of Class Representative's evidence and found in favor of the Class with respect to all five corrective disclosures. In this unlikely circumstance, the recovery falls well within the range of reasonableness that courts regularly approve in similar circumstances, and is greater than the median and average reported settlement amounts in securities class actions in 2017 ($5 million and $18.2 million, respectively). *See,* Laarni T. Bulan, Ellen M. Ryan, and Laura E. Simmons, *Securities Class Action Settlements – 2017 Review and Analysis*, at 3 (Cornerstone Research 2018), Ex. 7; *see also, In re Merrill Lynch & Co. Research Reports Sec. Litig.*, No. 02 MDL 1484 (JFK), 2007 WL 313474, at *10 (S.D.N.Y. Feb. 1, 2007)(approving $40.3 million settlement representing approximately 6.25% of estimated damages and noting was at the "higher end of the range of reasonableness of recovery in class actions securities litigation").

Although ***maximum*** potential damages are meaningfully higher than the Settlement Amount, the Settlement recovers a significantly greater percentage of damages when considered against the more likely scenario that the Court at summary judgment, or a jury at trial, would

credit Defendants' contrary arguments concerning loss causation. In Class Counsel's judgment, these arguments created a substantial risk that the Class would be unable to recover for the majority of the corrective disclosures alleged, and instead at most would recover based on Virtus's disclosure at the end of the Class Period that it was under investigation by the SEC. In this scenario, maximum recoverable damages are approximately $67 million, of which the Settlement Amount is nearly 33%—well above the range of reasonableness. ¶ 125.

Finally, even if Class Representative was successful at trial, Defendants could have challenged the damages of every Class member in post-trial proceedings, substantially reducing any aggregate recovery by plaintiffs.

* * *

In sum, the *Grinnell* factors support a finding that the Settlement is fair, reasonable, and adequate.

II. THE PLAN OF ALLOCATION IS FAIR AND REASONABLE AND SHOULD BE APPROVED

A plan for allocating settlement proceeds, like the settlement itself, should be approved if it is fair, reasonable, and adequate. *See IMAX*, 283 F.R.D. at 192; *Bear Stearns*, 909 F. Supp. 2d at 270. A plan of allocation with a "rational basis" satisfies this requirement. *FLAG Telecom*, 2010 WL 4537550, at *21; *In re Initial Pub. Offering Sec. Litig.*, 671 F. Supp. 2d 467, 497 (S.D.N.Y. 2009). A plan of allocation that reimburses class members based on the relative strength and value of their claims is reasonable. *See IMAX*, 283 F.R.D. at 192. However, a plan of allocation does not need to be tailored to fit each and every class member with "mathematical precision." *PaineWebber*, 171 F.R.D. at 133.

Here, the proposed plan of allocation (the "Plan of Allocation"), which was developed by Class Counsel in consultation with Class Representative's damages expert, provides a fair and

reasonable method to allocate the Net Settlement Fund among Class Members who submit valid Claim Forms. The Plan of Allocation is set forth at pages 7 to 10 of the Settlement Notice that was mailed to potential Class Members. *See* Settlement Notice (Donohue Decl., Ex. A) at pp. 7-10.

The Plan of Allocation provides for the distribution of the Net Settlement Fund based upon each Class Member's "Recognized Loss," as calculated by the formulas described in the Settlement Notice. In developing the Plan of Allocation, Class Representative's damages expert considered the amount of artificial inflation in the per share closing price of Virtus common stock that allegedly was proximately caused by Defendants' alleged false and misleading statements and omissions. ¶¶ 139-146; Ex. 3-A at ¶¶ 47-51.

GCG, as the Court-approved Claims Administrator, will determine each Authorized Claimant's *pro rata* share of the Net Settlement Fund based upon each Authorized Claimant's total Recognized Loss compared to the aggregate Recognized Losses of all Authorized Claimants, as calculated according to the Plan of Allocation. The calculation will depend upon several factors, including (a) when the Virtus common stock was purchased or otherwise acquired, and at what price; and (b) whether the Virtus common stock was sold or held through the end of the Class Period and the 90-day look-back period, and if the stock was sold, when and for what amounts. In general, the Recognized Loss Amount calculated will be the difference between the estimated artificial inflation on the date of purchase and the estimated artificial inflation on the date of sale, or the difference between the actual purchase price and sales price of the stock, whichever is less. ¶¶ 51-52. Accordingly, the proposed Plan of Allocation is designed to fairly and rationally allocate the proceeds of this Settlement among the Settlement Class.

For these reasons, Class Counsel believe that the Plan of Allocation provides a fair and

reasonable method to equitably allocate the Net Settlement Fund. ¶ 146. *See In re Giant Interactive Grp., Inc. Sec. Litig.*, 279 F.R.D. 151, 163 (S.D.N.Y. 2011) ("[i]n determining whether a plan of allocation is fair, courts look primarily to the opinion of counsel") (citation omitted); *In re Marsh ERISA Litig.*, 265 F.R.D. 128, 145 (S.D.N.Y. 2010) (same). Moreover, as noted above, as of September 18, 2018, more than 143,000 copies of the Settlement Notice, which contains the Plan of Allocation and advises Class Members of their right to object to the proposed Plan of Allocation, have been sent to potential Class Members and their nominees, *see* Donohue Decl. ¶ 6, and, to date, no objections to the proposed plan have been received. ¶ 147.

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

Class Representative has provided the Class with notice of the proposed Settlement that satisfied all the requirements of Rule 23(e) and due process, which require that notice of a settlement be "reasonable"—*i.e.*, it must "fairly apprise the [prospective] members of the class of the terms of the proposed settlement and of the options that are open to them in connection with the proceedings." *Visa*, 396 F.3d at 114; *see also Shapiro*, 2014 WL 1224666, at *16. Both the substance of the Settlement Notice and the method of its dissemination to potential members of the Class satisfied these standards.

The Settlement Notice provides all of the necessary information for Class Members to make an informed decision regarding the Settlement. The Settlement Notice informs Class Members of, among other things: (1) the amount of the Settlement; (2) the reasons why the Parties are proposing the Settlement; (3) the estimated average recovery per affected share of Virtus common stock; (4) the maximum amount of attorneys' fees and expenses that will be sought; (5) the identity and contact information for the representatives of Class Counsel who are reasonably available to answer questions from Class Members concerning matters contained in

the Settlement Notice; (6) the right of Class Members to object to the Settlement; (7) the binding effect of a judgment on Class Members; and (8) the dates and deadlines for certain Settlement-related events. *See* 15 U.S.C. § 78u-4(a)(7).[3] The Settlement Notice also contains the Plan of Allocation and provides Class Members with information on how to submit a Claim Form in order to be eligible to receive a distribution from the Net Settlement Fund.

On July 27, 2018, GCG began mailing copies of the Settlement Notice and Claim Form via first-class mail to all persons and entities who were previously mailed copies of the Class Notice in January 2018, as well as any other potential Class Members identified through reasonable effort, in accordance with the Preliminary Approval Order. *See* Donohue Decl. ¶¶ 3-4. In addition, GCG caused the Summary Settlement Notice to be published in the *Wall Street Journal* and *Financial Times* and to be released over *PRNewswire* on August 8, 2018. *Id.* ¶ 7. GCG also updated the website for this case, www.VirtusSecuritiesLitigation.com, to provide members of the Class and other interested persons with information about the Settlement and the applicable deadlines, as well as access to copies of the Settlement Notice, the Claim Form, Stipulation, and the Preliminary Approval Order, Donohue Decl. ¶ 9, and Class Counsel posted copies of the Settlement Notice and Claim Form on their respective websites, Joint Decl. ¶ 137.

This combination of individual first-class mail to all Class Members who could be identified with reasonable effort, supplemented by notice in an appropriate publication, transmitted over the newswire, and set forth on internet websites, was "the best notice . . . practicable under the circumstances." Fed. R. Civ. P. 23(c)(2)(B); *see, e.g.*, *Advanced Battery Techs.*, 298 F.R.D. at 182-83; *In re Marsh & McLennan Cos. Sec. Litig.*, No. 04 Civ. 8144 (CM),

[3] The Notice of Pendency of Class Action ("Class Notice"), previously mailed to potential Class Members in January 2018, provided them with an opportunity to request exclusion from the Class. No valid and timely requests for exclusion were received. ECF Nos. 141, 145.

2009 WL 5178546, at *12-13 (S.D.N.Y. Dec. 23, 2009).

CONCLUSION

For the foregoing reasons, Class Representative respectfully requests that the Court approve the proposed Settlement as fair, reasonable, and adequate and approve the Plan of Allocation as fair, reasonable, and adequate. Proposed orders will be submitted with Class Representative's reply papers, after the deadline for objections has passed.

Dated: September 19, 2018

Respectfully submitted,

/s/ Michael H. Rogers

LABATON SUCHAROW LLP
Michael H. Rogers
John J. Esmay
140 Broadway
New York, New York 10005
Tel: (212) 907-0700
Fax: (212) 818-0477
Email: mrogers@labaton.com
jesmay@labaton.com

BERNSTEIN LITOWITZ BERGER & GROSSMANN LLP
John C. Browne
Jesse L. Jensen
1251 Avenue of the Americas
New York, New York 10020
Tel: (212) 554-1400
Fax: (212) 554-1444
Email: johnb@blbglaw.com
jesse.jensen@blbglaw.com

Class Counsel and Co-Lead Counsel for Class Representative Arkansas Teacher Retirement System

CERTIFICATE OF SERVICE

I hereby certify that on September 19, 2018, I caused the foregoing Memorandum of Law in Support of Class Representative's Motion for Final Approval of Class Action Settlement and Approval of Plan of Allocation to be served electronically through the Court's ECF system upon all registered ECF participants.

/s/Michael H. Rogers
Michael H. Rogers