UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

IN RE: SUNEDISON, INC. SECURITIES LITIGATION This Document Relates To: *Horowitz et al. v. SunEdison, Inc. et al.*, Case No. 1:16-cv-07917-PKC	Civil Action No. 1:16-md-2742-PKC

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

Dated: July 12, 2019

TABLE OF CONTENTS

Page

PRELIMINARY STATEMENT 2

BACKGROUND 4

THE TERMS OF THE SETTLEMENT 8

ARGUMENT 9

I. PRELIMINARY APPROVAL IS WARRANTED 9

A. The Settlement Occurred After Good Faith, Arm's-Length Negotiations Conducted By Informed, Experienced Counsel 11

B. The Substantial Benefits For The Class, Weighed Against Litigation Risks, Support Preliminary Approval 13

II. THE COURT SHOULD NOT REQUIRE A SECOND OPT OUT PERIOD 19

III. THE PROPOSED FORM AND METHOD OF NOTICE OF THE SETTLEMENT ARE APPROPRIATE AND SHOULD BE APPROVED 22

IV. THE COURT SHOULD ADOPT THE PROPOSED SCHEDULE 24

CONCLUSION 25

TABLE OF AUTHORITIES

CASES

In re Bank of Am. Corp. Sec., Derivative & ERISA Litig.,
Master File 09 MDL 2058 (PKC), slip op. (S.D.N.Y. Dec. 4, 2012) 20

In re Bear Stearns Cos., Inc. Sec. Derivative & ERISA Litig.,
909 F. Supp. 2d 259 (S.D.N.Y. 2012)..11

City of Providence v. Aeropostale, Inc.,
2014 WL 1883494 (S.D.N.Y. May 9, 2014), *aff'd, Arbuthnot v. Pierson*, 607
F. App'x 73 (2d Cir. 2015) 12

Cohen v. J.P. Morgan Chase & Co.,
262 F.R.D. 153 (E.D.N.Y. 2009) 10

D'Amato v. Deutsche Bank,
236 F.3d 78 (2d Cir. 2001)..11

Denney v. Deutsche Bank AG,
443 F.3d 253 (2d Cir. 2006)..20

Dial Corp. v. News Corp.,
317 F.R.D. 426 (S.D.N.Y. 2016) 11

In re Giant Interactive Grp., Inc. Sec. Litig.,
279 F.R.D. 151 (S.D.N.Y. 2011) 11

In re Hi-Crush Partners L.P. Sec. Litig.,
2014 WL 7323417 (S.D.N.Y. Dec. 19, 2014) 14

In re Initial Pub. Offering Sec. Litig.,
243 F.R.D. 79 (S.D.N.Y. 2007) 10

In re Lloyd's Am. Trust Fund Litig.,
2002 WL 31663577 (S.D.N.Y. Nov. 26, 2002)...21

In re MetLife Demutualization Litig.,
689 F. Supp. 2d 297 (E.D.N.Y. 2010) 21

In re NASDAQ Mkt.-Makers Antitrust Litig.,
187 F.R.D. 465 (S.D.N.Y. 1998) 12

In re Platinum & Palladium Commod. Litig.,
2014 WL 3500655 (S.D.N.Y. Jul. 15, 2014) 10

In re Stock Exchs. Options Trading Antitrust Litig.,
2006 WL 3498590 (S.D.N.Y. Dec. 4, 2006) 23

In re Veeco Instruments Inc. Sec. Litig.,
2007 WL 4115809 (S.D.N.Y. Nov. 7, 2007)....................12

Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.,
396 F.3d 96 (2d Cir. 2005)....................11, 20

In re WorldCom, Inc. Sec. Litig.,
388 F. Supp. 2d 319 (S.D.N.Y. 2005)....................20

STATUTES

15 U.S.C. § 77z-1....................12, 22, 23

15 U.S.C. § 78u-4....................12, 22, 23

OTHER AUTHORITIES

Fed. R. Civ. P. 23(c)(2)(B)....................24

Fed. R. Civ. P. 23(e)(1)....................9

Fed. R. Civ. P. 23(e)(1)(B)....................10, 24

Fed. R. Civ. P. 23(e)(2)....................10

Lead Plaintiff the Municipal Employees' Retirement System of Michigan ("MERS") and Named Plaintiff Arkansas Teacher Retirement System ("ATRS," and together with MERS, "Plaintiffs"), on behalf of themselves and the other members of the certified Class, respectfully submit this memorandum of law in support of their unopposed motion (the "Motion") for preliminary approval of the proposed settlement reached in the above-captioned litigation (the "Settlement").[1] The Settlement provides a recovery to the Class of $74,000,000 with a potential additional payment of $2,000,000 to resolve this securities class action brought against former SunEdison CEO Ahmad Chatila ("Chatila"), former SunEdison CFO Brian Wuebbels ("Wuebbels"); former SunEdison independent directors (the "Director Defendants" and, together with Chatila and Wuebbels, the "SunEdison Defendants"); and the Underwriter Defendants (the "Underwriter Defendants," and together with the SunEdison Defendants, "Defendants").[2]

If approved, the Settlement will bring to a close over three years of hard-fought litigation, which includes substantial motion practice, certification of a litigation class, significant fact and expert discovery, multiple rounds of mediation, and robust arms-length negotiations between counsel. By this motion, Plaintiffs seek entry of an Order: (i) granting preliminary approval of the Settlement; (ii) approving the form and manner of providing notice of the Settlement to the Class previously certified by the Court; and (iii) scheduling a hearing date for final approval of the Settlement (the "Settlement Hearing") and related events (the "Preliminary Approval Order").

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[1] All capitalized terms used in this Memorandum that are not otherwise defined shall have the meanings given to them in the Stipulation and Agreement of Settlement, dated July 11, 2019 (the "Stipulation"), which is attached as Exhibit 1 to the Notice of Motion.

[2] The Director Defendants are Emmanuel Hernandez, Clayton Daley, Randy Zwirn, Peter Blackmore, Georganne Proctor, Antonio Alvarez, Steven Tesoriere, and James Williams. The Underwriter Defendants are Goldman, Sachs & Co., Merrill Lynch, Pierce, Fenner & Smith Inc., Deutsche Bank Securities Inc., Morgan Stanley & Co. LLC, J.P. Morgan Securities LLC, Macquarie Capital (USA), Inc., and MCS Capital Markets LLC.

PRELIMINARY STATEMENT

Plaintiffs have reached an agreement to settle this Action in exchange for payment to the Class of $74,000,000 in cash, with a possible additional recovery of up to $2,000,000. If approved, the Settlement will resolve this Action in its entirety. Plaintiffs believe that the proposed Settlement, which is the result of a mediator's recommendation, represents a very favorable result for the Class because it provides a significant recovery, particularly when compared to the risks that continued litigation might result in a smaller recovery, or no recovery at all. While Plaintiffs and Lead Counsel believe the claims asserted against Defendants have merit, Plaintiffs would have faced substantial challenges in establishing liability and damages and recovering on any substantial judgment. For example, Plaintiffs faced substantial challenges in proving that, after the Court's decision on the motion to dismiss, the one remaining alleged misstatement for the Exchange Act claims – Defendant Chatila's September 2, 2015 statement about the timing of SunEdison's cash flows – was false when made and was not protected as a forward-looking statement; that Chatila intended to mislead investors when he made the statement; and that the alleged misstatement was the cause of losses suffered by the Exchange Act Subclass. Plaintiffs also faced substantial hurdles in overcoming Defendants' negative-causation arguments that could have very substantially limited Securities Act damages. Finally, Plaintiffs faced substantial risks that, if the Action proceeded to trial, they would not be able to recover any substantial judgment obtained because Chatila, the sole remaining Exchange Act defendant, had limited assets and SunEdison's insurance coverage was a wasting asset that had been diminished (and would continue to be rapidly depleted) by costs of defending numerous related actions brought against SunEdison's officers and directors in the aftermath of the Company's collapse and the costs of funding several prior settlements.

Prior to entering into the Stipulation, Plaintiffs and Lead Counsel: (i) investigated and filed two extensive amended complaints, including the operative Second Amended Consolidated

Securities Class Action Complaint (the "Complaint"); (ii) defeated in part Defendants' motions to dismiss the Complaint; (iii) engaged in substantial fact and expert discovery, which involved (a) obtaining and reviewing more than 2,260,000 pages of documents by Defendants and third parties, including SunEdison; (b) taking 19 fact depositions; and (c) the Parties' exchange of ten expert reports from nine different experts; (iv) litigated numerous discovery disputes against Defendants and third parties; (v) successfully moved for class certification; (vi) filed pre-motion summary judgment letters; and (vii) participated in three separate mediation sessions, spanning six days, under the auspices of experienced and highly respected mediators Judge Layn R. Phillips and Gregory P. Lindstrom of Phillips ADR during the course of the litigation. Accordingly, Plaintiffs and Lead Counsel had a well-developed understanding of the strengths and weaknesses of the claims in the Action, which informed Plaintiffs' determination that the Settlement is fair, reasonable, and adequate.

At the Settlement Hearing, the Court will have before it more extensive papers in support of the Settlement, and it will be asked to determine whether the Settlement is fair, reasonable, and adequate under Second Circuit law. At present, Plaintiffs request only that the Court grant preliminary approval of the Settlement so that notice may be provided to the Class. Specifically, Plaintiffs request that this Court enter the proposed Preliminary Approval Order (attached as Exhibit A to the Stipulation and submitted herewith), which will, among other things: (i) grant preliminary approval of the Settlement; (ii) approve the form and manner of providing notice of the Settlement to the Class, including the form and content of the Settlement Notice, Claim Form, and Summary Settlement Notice; and (iii) schedule the Settlement Hearing and related events.

As discussed below, the Settlement is fair, reasonable, and adequate, and thus warrants the Court's preliminary approval.

BACKGROUND

This Action commenced on November 30, 2015 with the filing of a putative securities class action against Defendants in the Eastern District of Missouri styled *Horowitz v. SunEdison, Inc. et al.*, Case No. 4:15-cv-01769, ECF No. 1,[3] along with related actions filed on or around that date in the Northern District of California and California State Superior Court. In a Memorandum and Order dated March 24, 2016, Judge Sippel of the Eastern District of Missouri appointed MERS as Lead Plaintiff pursuant to the Private Securities Litigation Reform Act of 1995 and approved its selection of Bernstein Litowitz Berger & Grossmann LLP ("BLB&G") as Lead Counsel. ECF No. 53. On October 4, 2016, the U.S. Judicial Panel on Multidistrict Litigation granted MERS's motion for consolidation and transfer and ordered that the *Horowitz* Action and 14 other related actions be transferred to the Southern District of New York (the "Court") and assigned to the Honorable P. Kevin Castel for coordinated or consolidated pretrial proceedings. ECF No. 94.

On December 19, 2016, the Court granted Defendants' request for a onetime stay for the parties to participate in mediation. The mediation was unsuccessful, and the stay expired on March 31, 2017. On March 17, 2017, Plaintiffs filed the operative Complaint. ECF No. 138. The Complaint alleged violations of the federal securities laws against Defendants and KPMG, SunEdison's outside auditor during the relevant time periods. On June 9, 2017, Defendants and KPMG moved to dismiss the Complaint. ECF Nos. 145-51. Plaintiffs opposed the motions, and briefing on the motions to dismiss was completed on August 4, 2017. ECF Nos. 153-60. On March 6, 2018, the Court issued an order denying in part and granting in part Defendants' motions to dismiss the Complaint. ECF No. 167. Specifically, the Court dismissed all of Plaintiffs' Section

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[3] References to "ECF No. __" refer to the docket in the *Horowitz* case, Case No. 1:16-cv-7917-PKC (S.D.N.Y.).

10(b) and 20(a) claims against Chatila and Wuebbels except for a claim under Section 10(b) against Chatila concerning a statement he made in September 2015 concerning the timing of SunEdison's cash flows. The Court sustained Plaintiffs' Securities Act claims relating to Defendants' alleged misstatements and omissions in connection with SunEdison's August 18, 2015 Preferred Offering – specifically, its classification of the Margin Loan as non-recourse, and the omission from the Offering Documents of information regarding the Margin Call and the Second Lien Loan. The Court also sustained Plaintiffs' Section 15 claims against Chatila, Wuebbels, and the Director Defendants. The Court granted KPMG's motion to dismiss. On May 18, 2018, Defendants filed their Answers to the Complaint. ECF Nos. 179-81.

The Parties commenced fact discovery in March 2018, and prepared and served initial disclosures on May 8, 2018. Plaintiffs prepared and served requests for production of documents for Defendants and served document subpoenas on 22 third parties (including SunEdison). In response, Defendants and third parties produced a total of approximately 2,260,000 pages of documents to Plaintiffs. Plaintiffs produced over 12,000 pages of documents to Defendants in response to their requests, and Plaintiffs' market-efficiency expert produced more than 22,000 additional pages of documents to Defendants. Between September 2018 and February 2019, Plaintiffs deposed 19 fact witnesses, including nine former senior executives or high-ranking employees of SunEdison or related companies TerraForm Power and TerraForm Global, four former directors of SunEdison, and six representatives of the Underwriter Defendants. In connection with Plaintiffs' class-certification motion, Defendants deposed one representative from each Plaintiff, as well as Plaintiffs' market-efficiency expert Dr. Steven Feinstein. The Parties also served and responded to interrogatories and requests for admission and exchanged numerous letters, including disputes between the Parties and with nonparties, concerning discovery issues,

several of which were submitted to the Court for resolution.

On June 13, 2018, Plaintiffs filed their motion for class certification, which was accompanied by a report from Plaintiffs' expert on market efficiency and common damages methodologies. ECF Nos. 194-95. On August 6, 2018, Defendants opposed Plaintiffs' motion. ECF Nos. 215-16. On August 30, 2018, Plaintiffs filed a reply in further support of their motion. ECF Nos. 236-37. On January 7, 2019, the Court issued an Opinion and Order granting the class-certification motion with a modified class, certifying the Class consisting of the Exchange Act Subclass and Securities Act Subclass, appointing MERS as the Class Representative for the Exchange Act Subclass, appointing ATRS as the Class Representative for the Securities Act Subclass, and appointing BLB&G as Class Counsel for the certified Class. ECF No. 287.

The parties exchanged initial expert reports on March 1, 2019. Plaintiffs produced initial reports from two experts, which addressed the areas of damages and of SunEdison's cash-flow expectations. Defendants produced four initial expert reports, addressing the purported adequacy of the Underwriter Defendants' due diligence in connection with the August 18, 2015 Preferred Offering, the purported adequacy of the Director Defendants' due diligence in connection with the Preferred Offering (which report included nine declarations from the Director Defendants attesting as to the diligence done in connection with the Preferred Offering), the materiality of the alleged misstatements and omissions in the case, and price impact with respect to the declines in the price of the preferred stock issued in the Preferred Offering. On March 29, 2019, the parties exchanged rebuttal expert reports. Plaintiffs produced a report from their damages expert in response to Defendants' materiality and price-impact reports, and Plaintiffs produced reports from one expert in response to Defendants' underwriting due-diligence expert and another expert in response to Defendants' director due-diligence expert. Defendants produced one rebuttal report, in response

to Plaintiffs' expert's report on damages.

On March 7, 2019, Defendants filed four pre-motion letters with the Court, each discussing summary-judgment motions that Defendants intended to file: (1) a motion by Defendant Chatila raising falsity, scienter, and loss-causation arguments in connection with Plaintiffs' Section 10(b) claim; (2) a motion by the Underwriter Defendants raising materiality, falsity, negative causation, and due-diligence arguments; (3) a motion by the Director Defendants raising due diligence and control-person arguments, among others; and (4) a motion by Defendants Chatila and Wuebbels raising due diligence and control-person arguments in connection with Plaintiffs' Securities Act claims. ECF Nos. 303-06. Plaintiffs filed two responsive pre-motion letters on March 14, 2019, one addressing Defendants' anticipated motions for summary judgment on the Securities Act claims, and the other addressing Defendants' anticipated motions on the Exchange Act claim. ECF Nos. 307-08. The parties' letters raised numerous factual and legal arguments, and cited the extensive factual record adduced through discovery.

While expert discovery continued, the parties continued their discussions concerning potential resolution of the Action through settlement, including with the assistance of Judge Phillips and Mr. Lindstrom. These settlement negotiations occurred over a period of more than two years, including three in-person mediations totaling six days of mediation, dating back to before Defendants moved to dismiss the Complaint. During the mediation process, the parties exchanged detailed mediation statements addressing liability and damages issues with numerous exhibits. As a result of continued negotiations following these mediation sessions and throughout expert discovery, the Parties reached an agreement in principle to settle the Action on June 11, 2019, based on a mediator's recommendation by Judge Phillips. Thereafter, the Parties worked diligently to negotiate the full settlement terms, which are set forth in the Stipulation.

THE TERMS OF THE SETTLEMENT

The proposed Settlement provides that Defendants will pay or cause to be paid $74,000,000 in cash into an escrow account for the benefit of the Class. In addition, a potential supplemental payment of up to a maximum of $2,000,000 (in addition to the $74,000,000) (the "Supplemental Payment") may also be paid on behalf of Defendant Ahmad Chatila from certain of SunEdison's directors and officers insurance policies, if those funds are not exhausted by costs of defending or settling other actions under those insurance policies. Specifically, the insurers responsible for SunEdison's Side A D&O Insurance Policies will be obligated to make the Supplemental Payment when certain specified cases have been fully resolved.[4] At that time, $2,000,000 or whatever lesser amount remains available under the Side A D&O Insurance Policies, if any, will be paid into the settlement escrow account for the benefit of the Class.

The SunEdison Defendants and Underwriter Defendants will each make or cause to be made payments toward the $74 million Current Settlement Amount. *See* Stipulation ¶ 8. Pursuant to the terms of the Stipulation, the portion of the Settlement paid by the Underwriter Defendants will be allocated exclusively for payment of claims submitted by members of the Securities Act Subclass. *See* Stipulation ¶ 10. Under Plaintiffs' proposed Plan of Allocation for the proceeds of the Settlement, the portion of the $74 million Current Settlement Amount paid by the SunEdison Defendants will be allocated between the Exchange Act Subclass and Securities Act Subclass in proportion to Plaintiffs' damages expert's estimate of the size of total damages for the Exchange Act Subclass and the Securities Act Subclass. *See* proposed Settlement Notice (Ex. A-1 to the

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[4] Under the Parties' agreement, the list of actions which must be fully resolved before the Supplemental Payment will be made is to be maintained confidential because it includes investigations and potential, not-yet-filed actions as well as publicly filed cases. The Supplemental Agreement itself is publicly filed as Exhibit C to the Stipulation. If the Court would like to review the confidential list of actions, the Parties request that they be permitted to submit it to the Court under seal for *in camera* review.

Stipulation), at ¶ 87. Based on these calculations, under the proposed Plan of Allocation, $19.5 million of the Settlement Amount (plus any payments made in connection with the Supplemental Payment) will be allocated to the Exchange Act Subclass and $54.5 million will be allocated to the Securities Act Subclass. *See id*.

The full terms and conditions of the Settlement are set forth in the Stipulation, which is attached to the Notice of Motion as Exhibit 1. In addition, the Parties have entered into a confidential Termination Agreement that sets forth the conditions under which Defendants may terminate the Settlement if the number of persons or entities who request exclusion from the Exchange Act Subclass or Securities Act Subclass reaches a certain threshold. This agreement, often called a "blow provision," is a standard feature of securities class action settlements. The terms of such agreements are generally maintained as confidential in order to prevent potential opt-outs from threatening to trigger the blow provision and leveraging that threat to obtain additional payment from the settling parties.[5] In this case, the Termination Agreement will be moot unless the Court orders that Class Members be given a second opportunity to request exclusion from the Class in connection with the Settlement Notice. As discussed below in Part II, the Parties believe that the Court should not provide such a second opportunity because ample opportunity to opt-out from the Class was provided to Class Members in connection with the recently mailed Class Notice.

ARGUMENT

I. PRELIMINARY APPROVAL IS WARRANTED

A district court's review of a proposed class action settlement is a two-step process. First,

[5] If the Court would like to review the Termination Agreement, Plaintiffs request that the Parties be permitted to submit it to the Court under seal for *in camera* review. *See* Stipulation ¶ 39.

the court performs a preliminary review of the terms of the proposed settlement to determine whether to send notice of the proposed settlement to the class. *See* Fed. R. Civ. P. 23(e)(1). Second, after notice has been provided and a hearing has been held, the Court determines whether to approve the settlement on a finding that it is "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2).

A court should grant preliminary approval to authorize notice to the class upon a finding that it "will likely be able" to finally approve the settlement under Rule 23(e)(2). *See* Fed. R. Civ. P. 23(e)(1)(B). This standard for preliminary approval of class action settlements was newly established by amendments to Rule 23(e) that became effective on December 1, 2018. Prior to those amendments, Courts had developed a standard for preliminary approval through case law that was substantively similar to the current standard but phrased differently. A common formulation was that the court should grant preliminary approval if "the proposed settlement appears to be the product of serious, informed, non-collusive negotiations, has no obvious deficiencies, does not improperly grant preferential treatment to class representatives or segments of the class and falls within the range of possible approval[.]" *In re Initial Pub. Offering Sec. Litig.*, 243 F.R.D. 79, 87 (S.D.N.Y. 2007) (citation omitted); *accord In re Platinum & Palladium Commod. Litig.*, 2014 WL 3500655, at *11 (S.D.N.Y. Jul. 15, 2014); *Cohen v. J.P. Morgan Chase & Co.*, 262 F.R.D. 153, 157 (E.D.N.Y. 2009). In considering preliminary approval, a court looks to both the "negotiating process leading up to the settlement, *i.e.*, procedural fairness, as well as the settlement's substantive terms, *i.e.*, substantive fairness." *Platinum & Palladium*, 2014 WL 3500655 at *11.

As shown below, preliminary approval should be granted because the proposed Settlement is procedurally and substantively fair and the Court will be able to approve the Settlement as fair,

reasonable, and adequate at final approval.

A. The Settlement Occurred After Good Faith, Arm's-Length Negotiations Conducted By Informed, Experienced Counsel

Plaintiffs entered into the Stipulation after more than three-and-a-half years of litigation, including the resolution of Defendants' motions to dismiss and Plaintiffs' motion for class certification, extensive fact and expert discovery, and extended arm's-length negotiations by well-informed and experienced counsel, including with the assistance of experienced class-action mediators. These facts strongly support the conclusion that the Settlement is fair. *See Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.,* 396 F.3d 96, 116 (2d Cir. 2005) (settlement may be presumed to be fair where it is "reached in arm's-length negotiations between experienced, capable counsel after meaningful discovery"); *see also Dial Corp. v. News Corp.*, 317 F.R.D. 426, 430 (S.D.N.Y. 2016).

In particular, the fact that the Settlement was reached following extended mediation with former federal judge Layn Phillips and Gregory Lindstrom, both of whom are experienced mediators of complex class actions, and pursuant to a mediator's recommendation, strongly supports a finding that the Settlement is fair. *See D'Amato v. Deutsche Bank*, 236 F.3d 78, 85 (2d Cir. 2001) (a "mediator's involvement in . . . settlement negotiations helps to ensure that the proceedings were free of collusion and undue pressure"); *In re Bear Stearns Cos., Inc. Sec. Derivative & ERISA Litig.*, 909 F. Supp. 2d 259, 265 (S.D.N.Y. 2012) (finding a settlement fair where the parties engaged in "arm's length negotiations," including mediation before "retired federal judge Layn R. Phillips, an experienced and well-regarded mediator of complex securities cases"); *In re Giant Interactive Grp., Inc. Sec. Litig.*, 279 F.R.D. 151, 160 (S.D.N.Y. 2011) (a settlement was entitled to a presumption of fairness where it was the product of "arms-length negotiation" facilitated by Judge Phillips, "a respected mediator").

Further, Plaintiffs, who are sophisticated institutional investors of the type that Congress favored when it passed the Private Securities Litigation Reform Act, 15 U.S.C. §§ 77z-1, 78u-4 ("PSLRA"), closely supervised this litigation and recommend that the Settlement be approved. This further supports approval of the Settlement. *See In re Veeco Instruments Inc. Sec. Litig.*, 2007 WL 4115809, at *5 (S.D.N.Y. Nov. 7, 2007) ("[U]nder the PSLRA, a settlement reached . . . under the supervision and with the endorsement of a sophisticated institutional investor . . . is 'entitled to an even greater presumption of reasonableness . . . . Absent fraud or collusion, the court should be hesitant to substitute its judgment for that of the parties who negotiated the settlement.'"). Likewise, Lead Counsel has extensive experience in prosecuting securities class actions, both in this District and nationally, and has also concluded that the Settlement is in the best interests of the Class. *See In re NASDAQ Mkt.-Makers Antitrust Litig.*, 187 F.R.D. 465, 474 (S.D.N.Y. 1998) (courts give "'great weight' . . . to the recommendations of counsel").

Plaintiffs and Lead Counsel were knowledgeable about the strengths and weaknesses of the case prior to entering to the Stipulation. Plaintiffs had conducted an extensive investigation; prepared a detailed Complaint; briefed, argued and successfully defeated in part Defendants' motions to dismiss the Complaint; obtained class certification; obtained and reviewed approximately 2,260,000 pages of documents from Defendants and third parties; filed pre-motion summary-judgment letters; and worked with experts on market efficiency, damages, director due diligence, underwriter due diligence, and the Company's cash flows.

In sum, the fact that the Settlement is the product of arm's-length settlement negotiations, is based on a mediator's recommendation, has been approved by the Court-appointed Class Representatives, and was entered into by experienced and informed counsel, demonstrates the procedural fairness of the process by which the Settlement was reached. The Settlement is,

therefore, presumptively fair, reasonable, and adequate. *See City of Providence v. Aeropostale, Inc.*, 2014 WL 1883494, at *4 (S.D.N.Y. May 9, 2014) ("This initial presumption of fairness and adequacy applies here because the Settlement was reached by experienced, fully-informed counsel after arm's-length negotiations."), *aff'd*, *Arbuthnot v. Person,* 607 F. App'x 73 (2d Cir. 2015).

B. The Substantial Benefits For The Class, Weighed Against Litigation Risks, Support Preliminary Approval

The Settlement provides a payment of $74 million for the benefit of the Class, as well as a potential additional payment of up to $2 million. The Settlement is a favorable result for Class Members given the risks of continued litigation. Although Plaintiffs and Lead Counsel believe that the claims asserted against Defendants have merit, they recognize the expense and length of litigation through trial and appeals, as well as the very substantial risks they would face in establishing liability and damages.

First, with respect to Plaintiffs' claim against Defendant Ahmad Chatila under Section 10(b) of the Exchange Act, Plaintiffs faced significant risks that, at either the summary-judgment stage or after a trial, Chatila would prevail on the elements of falsity, scienter, and/or loss causation. Plaintiffs argued that Chatila's September 2, 2015 statement that the company would "generat[e] cash for a living" by "early 2016" was false in part because a late-August 2015 presentation by Company management to the Board projected positive total cash flows in the second quarter of 2016 at the earliest. That presentation also included certain financial metrics that were actually projected to be positive by the first quarter of 2016. Chatila argued that his September 2 statement referred to those metrics, and that his statement was therefore not false or made with the intent to deceive necessary to prove liability. If Chatila prevailed on either of those arguments, or in establishing that his statement was insulated from liability as a "forward looking" projection accompanied by adequate cautionary language, Plaintiffs would not have been able to

obtain any recovery for common stock investors in this Action.

Plaintiffs also faced the risk of not proving loss causation—that Chatila's alleged September 2, 2015 misstatement was the cause of investors' losses—and in proving damages for the Exchange Act claims. Chatila would likely argue that many of the corrective disclosures for which Plaintiffs claimed damages do not relate to his alleged false statement concerning the timing of the Company's cash flows, particularly given a subsequent statement on November 10, 2015 indicating that SunEdison would not generate positive cash flows until mid-2016. *See*, *e.g.*, *In re Hi-Crush Partners L.P. Sec. Litig.*, 2014 WL 7323417, at *8 (S.D.N.Y. Dec. 19, 2014) (finding settlement favorable where lead plaintiffs "faced the risk that they would be unable to prove loss causation and damages"). If Chatila prevailed on his loss-causation arguments, recoverable damages would have declined significantly.

Second, Plaintiffs faced substantial risks of proving liability and damages on their Securities Act claims. The Securities Act claims arise from three alleged misstatements and omissions in connection with the August 18, 2015 Preferred Offering: (1) Defendants' failure to disclose a margin call (the "Margin Call") that the Company received on an outstanding $410 million margin loan (the "Margin Loan") on August 7, 2015; (2) Defendants' failure to disclose a $169 million second-lien loan from Goldman Sachs Bank USA (the "Goldman Loan") that closed and was funded on August 11, 2015; and (3) the Company's inaccurate characterization of the Margin Loan as non-recourse debt, when it was in fact recourse to the Company. Plaintiffs risked being unable to prove that each of those statements and omissions was materially false and misleading. For example, Defendants could have prevailed on the argument that investors knew or should have known when the Margin Call occurred based on SunEdison's prior disclosures that provided many if not all of the metrics used in the formula to calculate the triggers for any margin

calls, including the amount of collateral posted for the Margin Loan (in the form of 32.2 million shares of TerraForm Power stock) and the loan-to-value ratio SunEdison was required to maintain on the Margin Loan. Defendants argued that investors could have monitored the share price of TerraForm Power and determined precisely when the value of the collateral dropped, triggering a margin call and requiring the Company to post additional collateral. Defendants may also have prevailed in arguing that the amount of the Margin Call was not material.

Regarding the Goldman Loan, Defendants may have prevailed on their arguments that the $169 million amount of the loan was not material, and that the terms of the Goldman Loan (including the interest rate and fees that Goldman charged) would not have been material to investors. Defendants introduced and developed evidence to support those arguments, including testimony and documents suggesting that the Goldman Loan's interest rate as disclosed in a November 2015 filing was actually incorrect and overstated, and that the fees disclosed at that time were also incorrect and were substantially inflated by legal fees for unrelated work. Plaintiffs may not have proven liability if the jury determined that the interest rate and fees for the Goldman Loan were lower than Plaintiffs contended, and therefore did not indicate any underlying difficulty accessing the capital markets or other financial problems at SunEdison. Regarding the recourse nature of the Margin Loan, Plaintiffs risked Defendants prevailing on arguments that the amount of the loan was not material, and that, given other disclosures prior to the Preferred Offering that did accurately describe the Margin Loan, investors were not misled.

Plaintiffs also faced the significant risk that Defendants could prevail on "negative causation" arguments by establishing as a matter of law, or proving to a jury, that declines in the price of SunEdison preferred stock after November 9, 2015 were due to reasons other than the alleged misstatements and omissions underlying Plaintiffs' Securities Act claims. Specifically,

Defendants would contend that the Company had fully disclosed and corrected the three items underlying the Securities Act claims (the Margin Call, the Goldman Loan, and the recourse nature of the Margin Loan) by the time that SunEdison's Form 10-Q was filed on November 9, 2015, and thus all subsequent stock price declines must be attributed to other, unrelated reasons. If the Court or a jury agreed and found that Defendants proved negative causation for declines in the value of SunEdison preferred stock after November 9, 2015, the amount of recoverable damages would have been substantially less.

Further, Plaintiffs faced the risk that the Underwriter Defendants and/or Director Defendants would prevail on summary judgment or at trial in proving their defense that they conducted adequate due diligence and thus cannot be liable. The Underwriter Defendants could have proven that, among other things, they conducted due diligence through their retention of experienced counsel in connection with the Preferred Offering, as well as based on previous diligence conducted for SunEdison in connection with other offerings and at various points leading up to the Preferred Offering. Similarly, the Director Defendants could have prevailed on such a defense because the Audit Committee of the SunEdison Board reviewed the Company's quarterly and annual filings incorporated into the Prospectus Supplement for the Preferred Offering, those filings were also reviewed by counsel and the Company's outside auditors, and because, they would contend, they were not aware of any "red flags" prior to the Preferred Offering that triggered any additional or heightened due-diligence obligations.

On all of these issues, Plaintiffs would have to prevail at several stages—on a motion for summary judgment and at trial, and if it prevailed on those, on the appeals that would likely to follow—which would have taken years. At each stage, there were very significant risks attendant to the continued prosecution of the Action, as well as considerable delay. The Settlement is

desirable because it will provide a prompt and certain benefit to the Class rather than the mere possibility of a recovery after additional years of litigation and appeals.

Lastly, Plaintiffs faced the substantial risk that even if they were to secure a significant judgment at trial, some of the Defendants would be unable to satisfy such a judgment. Concerning Plaintiffs' Section 10(b) claim, Chatila is the only remaining defendant; he does not have any substantial personal assets to contribute to any settlement or post-trial judgment, including because he held his SunEdison stock until it completely declined in value. Further, SunEdison, as a bankrupt, liquidating entity, is not a Defendant. Accordingly, any judgment or settlement of Plaintiffs' Section 10(b) claim would be satisfied using only insurance funds. Given that this case has been litigated over the course of over three years, however, available insurance money has significantly diminished, as it has been used both to defend against and resolve several governmental investigations and private actions, including class actions on behalf of TerraForm Power and TerraForm Global shareholders, a derivative action on behalf of TerraForm Global shareholders, individual actions by large institutions raising Securities Act claims concerning the August 2015 Preferred Offering, and one or more investigations by the U.S. Department of Justice. Plaintiffs believe that the settlement in this case represents the substantial majority of the remaining available insurance funds available to satisfy the claims against Chatila.

The Settlement is also reasonable when considered in relation to the range of potential recoveries that might be recovered if Plaintiffs prevailed at trial, which was far from certain for the reasons noted above. The potential damages that could be established for the Securities Act Subclass ranged from $159.2 million, if Defendants' "negative causation" defense cutting off damages as of November 9, 2015 was successful, up to a maximum of $297 million. Accordingly, the $54.5 million that will be available for Securities Act claimants represents 18% to 34% of the

maximum recoverable damages for that subclass. While the $19.5 million recovered for the Exchange Act Subclass under the Settlement represents a much smaller percentage of the theoretical maximum damages for that subclass,[6] in light of Chatila's inability to pay a substantial judgment and the diminished and rapidly depleting amount of insurance remaining, any such maximum damages were entirely theoretical. Any analysis of the adequacy of the settlement of the Exchange Act Subclass claims must be considered in light of amounts that could actually be recovered. Plaintiffs believe that amounts recovered under the Settlement include the substantial majority of remaining insurance funds available to satisfy the claims against Chatila and thus the Settlement provides a favorable outcome for these claimants.

Moreover, the Parties structured a $2 million contingent Supplemental Payment in an attempt to maximize insurers' contributions to the Settlement and to potentially provide additional recovery for the Class by creating an obligation for insurers to pay an additional amount of up to $2 million if insurance funds are not exhausted by insurers' other obligations (such as obligations to pay ongoing defense costs for certain officers and directors). Once all litigation for which insurance coverage requests have been made has been resolved, any remaining Side A insurance funds (those which cover claims against Chatila) up to $2 million will be paid to the Class. While Plaintiffs reasonably expect some payment will be received pursuant to the Supplemental Payment, no payment is guaranteed, and Plaintiffs submit the $74 million Current Settlement Amount is sufficient by itself to make the Settlement fair, reasonable, and adequate.

Thus, for all the foregoing reasons, Plaintiffs respectfully request that the Court take the first step in the approval process and grant preliminary approval.

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[6] Theoretical maximum damages for the Exchange Act Subclass ranged from $206.4 million (if Defendants' loss causation arguments cutting off damages as of November 9, 2015 prevailed) to over $1 billion if damages for the entire Exchange Act Class Period were included.

II. THE COURT SHOULD NOT REQUIRE A SECOND OPT OUT PERIOD

As discussed above, the Court certified the Class in this Action on January 7, 2019. ECF No. 287. By Orders dated February 11, 2019 and March 21, 2019 (ECF Nos. 295, 310), the Court approved the form and manner of notifying potential Class Members of the Action pending against Defendants, of the Court's certification of the Action to proceed as a class action on behalf of the Class, and of Class Members' right to request to be excluded from the Class or one of the subclasses, the effect of remaining in the Class or requesting exclusion, and the requirements for requesting exclusion.

As set forth in the Declaration of Richard W. Simmons Concerning Class Notice and Report on Requests for Exclusion Received, filed herewith ("Simmons Decl."), the Court-appointed Notice Administrator Analytics Consulting, LLC ("Analytics") began mailing the Notice of Pendency of Class Action (the "Class Notice") to potential Class Members beginning on April 18, 2019. *See* Simmons Decl. ¶¶ 3-5. Through July 11, 2019, Analytics had sent the Class Notice to 176,830 potential Class Members or their nominees (such as banks or brokers). *See id.* ¶ 8. In addition, the Summary Notice of Pendency of Class Action ("Summary Class Notice") was published in the *Wall Street Journal* and transmitted over the *PR Newswire* on April 30, 2019. *See id.* ¶ 9.

The Class Notice provided Class Members with the opportunity to request exclusion from the Class or one of the subclasses, explained that right, and set forth the deadline and procedures for doing so. The Class Notice stated that it would be within the Court's discretion whether or not to permit a second opportunity to request exclusion from the Class or one of the subclasses if there was a settlement or judgment in the Action. Simmons Decl. Ex. A at ¶ 13(a). The Class Notice also informed Class Members that if they chose to remain a member of the Class, they would "be bound by all past, present, and future orders and judgments in the Action, whether favorable or

unfavorable." *Id*.

The deadline for requesting exclusion from the Class or one of the two subclasses pursuant to the Class Notice was June 17, 2019. In response to the widespread dissemination of the Class Notice, a total of 28 persons and entities requested exclusion from the Class or one of the two subclasses, as listed on Appendix 1 and 2 to the Stipulation. *See also* Simmons Decl. ¶ 12 & Ex. D.

In light of the extensive notice program recently undertaken in connection with class certification which provided Class Members with ample opportunity to request exclusion from the Class if they wish to do so, the Parties recommend that the Court not provide a second opportunity for Class Members to request exclusion in connection with the Settlement.

The decision whether to grant a second opt-out period pursuant to Rule 23(e)(4) is "confided to the [district] court's discretion," and the court is "under no obligation" to do so. *Denney v. Deutsche Bank AG*, 443 F.3d 253, 271 (2d Cir. 2006) (affirming decision to not provide a second opt out period). The Second Circuit has specifically held that it is unnecessary to provide a second opt-out period where, as here, the class was previously given a full opportunity to opt out following class certification, and will receive notice of the settlement and the opportunity to object at the fairness hearing. *See Wal-Mart Stores*, 396 F.3d at 114-115. In accordance with this authority, courts in this Circuit have repeatedly declined to provide second opt-out periods in complex securities class actions when notice has previously been provided to the class. *See, e.g.*, *In re Bank of Am. Corp. Sec., Derivative & ERISA Litig.*, Master File 09 MDL 2058 (PKC), slip op. at 10-11 (S.D.N.Y. Dec. 4, 2012) (Castel, J.) (exercising discretion not to allow second opt-out period in securities class action); *In re WorldCom, Inc. Sec. Litig.*, 388 F. Supp. 2d 319, 342 (S.D.N.Y. 2005) (Cote, J.) (finding "no reason … to permit a second opportunity to opt out"

because class members received a full opportunity to opt-out following class certification, and had opportunity to object to the settlement at the fairness hearing); *In re Lloyd's Am. Trust Fund Litig.*, 2002 WL 31663577, at *12 (S.D.N.Y. Nov. 26, 2002) (Sweet, J.) (declining to provide "a second opportunity to opt out" at the settlement approval stage, holding that due process required only that class members receive an opportunity to opt out after class certification, followed by "notice of the proposed settlement and an opportunity to be heard at a fairness hearing"); *see also In re MetLife Demutualization Litig.*, 689 F. Supp. 2d 297, 345 (E.D.N.Y. 2010) (Weinstein, J.) (holding that "[i]t is not necessary to provide the class members with an opportunity to opt out of the Settlement," and noting that "[i]f any class members wished to control the prosecution or settlement of their own claims, they could have opted out or sought to intervene after notice of pendency was given").

In this case, there is no reason to depart from this standard practice and require a second opt out opportunity. For example, there is no inaccuracy in the information set forth in the Class Notice on which opt-out decisions may have been based, and no other unique issue or new development that might warrant a second opt-out opportunity. Indeed, for several reasons, a second opt-out period would be especially inappropriate here. First, following class certification, Plaintiffs and Analytics conducted an extensive notice program that easily satisfies the requirements of Rule 23 and the Due Process Clause. The Class Notice and Summary Class Notice clearly explained the nature of the Action and informed potential Class Members of their right to request exclusion from the Class, how and when to do so, and the consequences of their decision of whether to do so. *See* Simmons Decl. Ex. A at ¶¶ 12-16, Exs. B, C. Significantly, the Class Notice and Summary Class Notice made clear that there might not be a second chance to opt out, stating that "it is within the Court's discretion whether to allow a second opportunity to request

exclusion from the Class or one of the subclasses if there is a settlement or judgment in the Action," Simmons Decl. Ex. A at ¶ 13(a), Exs. B, C, and further stated that investors who elect to remain members of the Class "will be bound by all past, present, and future orders and judgments in the Action, whether favorable or unfavorable." Simmons Decl. Ex. A at ¶ 13(a), Exs. B, C. Thus, Class Members were provided full information concerning their opt out rights and ample opportunity to exercise those rights.

Second, the response to this widespread notice program demonstrates that it was effective. In response to the Class Notice, 28 potential Class Members have requested exclusion from the Class or one of the subclasses. *See* Simmons Decl. ¶ 12 & Ex. D. Those who have requested exclusion range from large institutional investors – several groups of institutional investors who had previously brought their own actions regarding SunEdison preferred stock pending before this Court – to individual investors who held as few as 100 common shares during the Class Period. Although the number of opt outs is small when compared to the size of the Class, the fact that both individuals and sophisticated institutions have exercised their right to exclude themselves from the class action demonstrates the thoroughness and adequacy of the previous notice to Class Members. In sum, for the reasons set forth above, the Court should not require a second opt-out period.

III. THE PROPOSED FORM AND METHOD OF NOTICE OF THE SETTLEMENT ARE APPROPRIATE AND SHOULD BE APPROVED

Plaintiffs also request that the Court approve the form and content of the proposed Settlement Notice and Summary Settlement Notice, attached as Exhibits 1 and 3 to the Preliminary Approval Order, as well as the method for providing notice, which satisfy the requirements of due process, the Federal Rules of Civil Procedure, and the PSLRA, 15 U.S.C. §§ 77z-1(a)(7), 78u-4(a)(7). The content of a class action settlement notice is generally found to be reasonable if "the average class member [would] understand[] the terms of the proposed settlement and the options

provided to class members thereunder." *In re Stock Exchs. Options Trading Antitrust Litig.*, 2006 WL 3498590 at *6 (S.D.N.Y. Dec. 4, 2006) (citation omitted).

The proposed Notice describes the proposed Settlement, and sets forth, among other things: the nature of the Action; the definition of the certified Class; the claims and issues in the Action; what has occurred in the case to the present time; the claims that will be released; and the proposed Plan of Allocation for the proceeds of the Settlement. The Notice also advises that a Class Member may enter an appearance through counsel if desired; describes the effect of the Settlement on Class Members; states the procedures and deadlines for Class Members to object to the proposed Settlement, the proposed Plan of Allocation, and/or the requested attorneys' fees and expenses; states the procedures and deadline for submitting a Claim Form to recover from the Settlement; and provides the date, time, and location of the final Settlement Hearing.

The Notice also satisfies the PSLRA's separate disclosure requirements by, *inter alia*, stating: (i) the amount of the Settlement determined in the aggregate and on an average per share basis; (ii) that the Parties do not agree on the average amount of damages per share that would be recoverable in the event that Plaintiffs prevailed, and stating the issues on which the Parties disagree; (iii) the name, telephone number, and address of Lead Counsel who will be available to answer questions concerning any matter contained in the Notice; (iv) the reasons why the Parties are proposing the Settlement; and (v) that Lead Counsel intend to make an application for an award of attorneys' fees and expenses (including the amount of such fees and expenses determined on an average per share basis). *See* 15 U.S.C. §§ 77z-1(a)(7), 78u-4(a)(7).

With respect to the application for attorneys' fees and expenses, the case has been prosecuted on a contingency basis since 2016 and Lead Counsel has not received any payment of fees or expenses. Lead Counsel will apply to the Court for an award of attorneys' fees in an amount

not to exceed 22% of the Settlement Fund. With respect to litigation expenses, Lead Counsel will apply for payment of Litigation Expenses incurred in connection with the institution, prosecution, and resolution of the claims against the Defendants, in an amount not to exceed $2 million, which may include an application for the reasonable costs and expenses incurred by Plaintiffs directly related to their representation of the Class. The full details and basis for the fee and expense request will be detailed in Lead Counsel's motion which will be filed 35 days before the Settlement Hearing.

In accordance with the terms of the Preliminary Approval Order to be entered by the Court, Lead Counsel shall cause the Claims Administrator to mail the Notice and Claim Form to those members of the Class as may be identified through reasonable effort. Specifically, Analytics will mail copies of the Settlement Notice and Claim Form (the "Settlement Notice Packet") to all Class Members who were identified in connection with the mailing of the Class Notice. Analytics will also mail copies of the Settlement Notice Packet to brokers, banks, and other custodians and instruct them that, if they have updated or additional names and addresses of Class Members that were not provided in connection with the Class Notice they should provide them now.

Rule 23(c)(2)(B) requires a certified class to receive "the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Similarly, Rule 23(e)(1)(B) requires a court to "direct notice in a reasonable manner to all class members who would be bound by the proposal." The proposed notice plan set forth above readily meets these standards and is typical of notice plans in similar actions. For all of the foregoing reasons, the notice program should be approved by the Court.

IV. THE COURT SHOULD ADOPT THE PROPOSED SCHEDULE

If the Court grants preliminary approval of the Settlement, Plaintiffs respectfully propose the schedule set forth below for Settlement-related events.

Event	Proposed Timing
Deadline for mailing the Notice and Claim Form to Class Members (which date shall be the "Notice Date") (Preliminary Approval Order ¶ 4(a))	No later than 10 business days after entry of Preliminary Approval Order
Deadline for publishing the Summary Notice (Preliminary Approval Order ¶ 4(c))	No later than 10 business days after the Notice Date
Deadline for filing of papers in support of final approval of the Settlement and Plan of Allocation, and Lead Counsel's motion for attorneys' fees and expenses (Preliminary Approval Order ¶ 22)	35 calendar days before the date set for the Settlement Hearing
Deadline for receipt of objections to Settlement, Plan of Allocation and/or motion for fees and expenses (Preliminary Approval Order ¶ 12)	21 calendar days before the date set for the Settlement Hearing
Deadline for filing reply papers in support of final approval of the Settlement and Plan of Allocation, and Lead Counsel's motion for fees and expenses (Preliminary Approval Order ¶ 22)	7 calendar days before the date set for the Settlement Hearing
Settlement Hearing (Preliminary Approval Order ¶ 2)	A date to be selected by the Court, 100 calendar days after entry of the Preliminary Approval Order, or at the Court's earliest convenience thereafter
Postmark deadline for submitting Claim Forms (Preliminary Approval Order ¶ 8)	120 calendar days after the Notice Date.

If the Court agrees with the proposed schedule, Plaintiffs request that the Court schedule the Settlement Hearing 100 calendar days after entry of the Preliminary Approval Order, or at the Court's earliest convenience thereafter.

CONCLUSION

Based on the foregoing, Plaintiffs respectfully request that the Court enter the proposed Preliminary Approval Order, which will provide for: (i) preliminary approval of the Settlement; (ii) approval of the form and manner of giving notice of the Settlement to the Class; and (iii) a hearing date and time to consider final approval of the Settlement and related matters.

Dated: July 12, 2019

Respectfully submitted,

/s/ *Salvatore J. Graziano*

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