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**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF UTAH**
**CENTRAL DIVISION**

| IN RE MYRIAD GENETICS, INC. SECURITIES LITIGATION | Case No. 2:19-cv-00707-JNP-DBP<br>**LEAD PLAINTIFF'S MOTION FOR FINAL APPROVAL OF SETTLEMENT AND PLAN OF ALLOCATION, AND MEMORANDUM OF LAW IN SUPPORT THEREOF**<br>District Judge Jill N. Parrish |
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Pursuant to Rule 23(e)(2) of the Federal Rules of Civil Procedure, Court-appointed Lead Plaintiff and Class Representative Los Angeles Fire and Police Pensions ("Los Angeles"), on behalf of itself and the Court-certified Class, respectfully moves this Court, and submits this Memorandum of Law in support of its Motion, for final approval of the proposed settlement of this Action (the "Settlement") and for approval of the proposed plan of allocation (the "Plan of Allocation").[1]

## I. PRELIMINARY STATEMENT

Los Angeles has agreed, subject to Court approval, to settle all claims in this Action in exchange for a total settlement value of $77,500,000 consisting of cash and Myriad common stock. Los Angeles respectfully submits that the proposed Settlement is an excellent result for the Class and easily satisfies the standards for final approval under Rule 23(e)(2) of the Federal Rules of Civil Procedure.

The proposed Settlement is the largest securities class action recovery ever achieved in Utah and ranks among the top ten such recoveries in Tenth Circuit history. Moreover, as detailed in the accompanying Alexander Declaration[2] and as set forth herein, the Settlement Amount

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[1] Unless otherwise defined herein, all capitalized terms have the meanings set forth in the Stipulation and Agreement of Settlement dated August 3, 2023 (ECF No. 283-1) (the "Stipulation") or in the Declaration of Abe Alexander in Support of (A) Lead Plaintiff's Motion for Final Approval of Settlement and Plan of Allocation and (B) Lead Counsel's Motion for An Award of Attorney's Fees and Litigation Expenses (the "Alexander Declaration" or "Alexander Decl."), filed herewith. Citations to "¶" in this memorandum refer to paragraphs in the Alexander Declaration and citations to "Ex." in this memorandum refer to exhibits to the Alexander Declaration. Unless otherwise indicated, internal quotations and citations are omitted.

[2] The Alexander 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 (¶19); the nature of the claims asserted (¶¶12-18); the negotiations leading to the Settlement (¶¶91-96); the risks and uncertainties of continued litigation (¶¶97-127); and the terms of the Plan of Allocation for the Settlement proceeds (¶¶139-147).

exceeds the typical securities class action settlement, and represents a very favorable recovery given the risks inherent in this litigation and Myriad's financial condition.

Los Angeles and Lead Counsel have a well-developed understanding of the strengths and weaknesses of the Action. As detailed in the accompanying Alexander Declaration, Los Angeles and Lead Counsel have committed the resources necessary to become deeply familiar with the strengths and weaknesses of the Class's claims and Defendants' defenses. These efforts are detailed with particularity in the Alexander Declaration, but include (i) conducting an extensive pre-suit investigation that included a detailed review and analysis of the voluminous public record and interviews of several former Myriad employees; (ii) preparing and filing a detailed 143-page amended Complaint; (iii) successfully opposing Defendants' motion to dismiss the Complaint; (iv) obtaining certification of the Class through a contested class certification motion; (v) conducting robust discovery, including obtaining and reviewing over 1.7 million pages of documents produced by Defendants and non-parties, and deposing 22 fact witnesses, including Myriad's top executives and scientists, as well as key third-parties; (vi) extensively consulting with prominent experts in the fields of psychiatry, pharmacogenomics, statistics, financial economics, and accounting, including obtaining expert reports from these individuals outlining their expected trial testimony; (vii) engaging in a formal mediation with two experienced mediators, former District Court Judge Layn R. Phillips and Michelle Yoshida; (viii) negotiating a favorable resolution to the litigation; and (ix) drafting and negotiating the Stipulation and related settlement documentation.

While Los Angeles continues to believe that the claims asserted against Defendants are meritorious, it recognizes that the Action presented a number of risks to establishing the liability of Defendants, including challenges in proving the elements of falsity, scienter, and loss causation

required to prove a securities fraud claim, particularly in light of the technical and complex subject matter of this case. In addition, given that Myriad is a "small cap" life sciences company that has operated at a combined loss of over $700 million over the past four years, reporting either negative operating cash flow or a net loss in every quarter during that period, there was a substantial risk that even if Los Angeles was successful in establishing liability at trial (and after appeals from any verdict), Myriad would have been forced into bankruptcy rather than be able to pay a judgment. Absent the Settlement, the Parties faced the prospect of protracted litigation through the completion of costly expert discovery, additional contested motions, a trial, post-trial motion practice, and likely ensuing appeals. The Settlement avoids these risks while providing a substantial, certain, and immediate benefit to the Class in the form of a $77,500,000 recovery.

In light of these considerations, Los Angeles and Lead Counsel respectfully submit that the proposed Settlement is fair, reasonable, and adequate and warrants final approval by the Court. Additionally, Los Angeles and Lead Counsel request that the Court approve the proposed Plan of Allocation, which was set forth in the Notice mailed to potential Class Members. The Plan of Allocation provides a reasonable method for allocating the Net Settlement Fund among Class Members who submit valid claims based on damages they suffered that were attributable to the alleged fraud. Significantly, and following extensive notice to the Class, Lead Plaintiff has not received a ***single*** objection to the Settlement to date.

## II. TERMS OF THE SETTLEMENT

The $77.5 million Settlement Amount consists of a cash payment of at least $20 million and payment of the remaining $55.5 million in either additional cash or shares of freely-tradable Myriad common stock (the "Settlement Shares"). Stipulation ¶1(ww). Pursuant to the terms of the Stipulation, Myriad has already deposited $20 million into an interest-bearing escrow account (the "Escrow Account"). *Id.* ¶8(a). Also, pursuant to the terms of the Stipulation, Myriad will disclose

to Lead Counsel prior to the Settlement Hearing what proportion of the remaining Settlement Amount will be paid in cash (the "Additional Cash Amount") or shares of Myriad common stock (the "Stock Component"); Myriad will deposit Additional Cash Amount into the Escrow Account no later than three calendar days after the date of the Court's entry of a judgment finally approving the Settlement; and the Settlement Shares, which may be issued in reliance upon the exemption from registration provided by Section 3(a)(10) of the Securities Act based on this Court's approval of the Settlement, will be delivered to a Securities Brokerage Account established by Los Angeles no later than three business days after the date of entry of the judgment. *Id.* ¶8(b), (c), and (e). Subject to the terms of the Stipulation, upon receipt of the Settlement Shares into the Securities Brokerage Account, Lead Counsel intends to liquidate all of the Settlement Shares and distribute the net cash proceeds from the sale of the shares to Authorized Claimants.

## III. ARGUMENT

### A. The Proposed Settlement Merits Final Approval

Federal Rule of Civil Procedure 23(e) requires judicial approval for any compromise or settlement of class-action claims. *See* Fed. R. Civ. P. 23(e). A class-action settlement merits approval where the court finds it "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2).

Courts in the Tenth Circuit recognize a policy favoring the settlement of litigation. *See Am. Home Assurance Co. v. Cessna Aircraft Co.*, 551 F.2d 804, 808 (10th Cir. 1977) ("[t]he inveterate policy of the law is to encourage, promote, and sustain the compromise and settlement of disputed claims."); *see also Big O Tires, Inc. v. Bigfoot 4x4, Inc.*, 167 F. Supp. 2d 1216, 1229 (D. Colo. 2001) ("As a matter of public policy, the law favors and encourages settlements . . . [and] [t]he settlement of actions should be fostered to avoid protracted, wasteful and expensive litigation."). The policy in support of settlement is particularly strong in complex class actions such as this one, "where substantial judicial resources can be conserved by avoiding formal

litigation." *Tuten v. United Airlines, Inc.*, 41 F. Supp.3d 1003, 1007 (D. Colo. 2014); *see also O'Dowd v. Anthem, Inc.*, 2019 WL 4279123, at *12 (D. Colo. Sept. 9, 2019) ("The presumption in favor of voluntary settlement agreements is especially strong in class actions.").

Rule 23(e)(2) provides that courts should determine whether a proposed settlement is "fair, reasonable, and adequate" after considering whether:

> (A) the class representatives and class counsel have adequately represented the class; (B) the proposal was negotiated at arm's length; (C) the relief provided for the class is adequate, taking into account: (i) the costs, risks, and delay of trial and appeal; (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims; (iii) the terms of any proposed award of attorney's fees, including timing of payment; and (iv) any agreement required to be identified under Rule 23(e)(3); and (D) the proposal treats class members equitably relative to each other.

Fed. R. Civ. P. 23(e)(2). The Tenth Circuit has historically held that courts should also consider following factors in evaluating class settlements, many of which overlap with the Rule 23(e)(2) factors:

> (1) whether the proposed Settlement was fairly and honestly negotiated; (2) whether serious questions of law and fact exist, placing the ultimate outcome of the litigation in doubt; (3) whether the value of an immediate recovery outweighs the mere possibility of future relief after protracted and expensive litigation; and (4) the judgment of the parties that the settlement is fair and reasonable."

*Rutter & Wilbanks Corp. v. Shell Oil Co.*, 314 F.3d 1180, 1188 (10th Cir. 2002).[3] As set forth below, ***all*** of the relevant factors strongly support approval here.

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[3] The Advisory Committee Notes to the 2018 amendment to the Federal Rules note that the four factors set forth in Rule 23(e)(2) are not intended to "displace" any factor previously adopted by a Court of Appeals, but "to focus the court and the lawyers on the core concerns of procedure and substance that should guide the decision whether to approve the proposal." Fed. R. Civ. P. 23(e)(2)'s advisory committee's note to 2018 Amendment.

### 1. Los Angeles and Lead Counsel Have Adequately Represented the Class

In weighing approval, a court should consider whether "the class representatives and class counsel have adequately represented the class." Fed. R. Civ. P. 23(e)(2)(A). This involves an inquiry into whether any conflicts exist between lead plaintiff and the class and the ability of lead plaintiff and its counsel to conduct the litigation. *See Rutter*, 314 F.3d at 1187-88 ("Resolution of two questions determines legal adequacy: (1) do the named plaintiffs and their counsel have any conflicts of interest with other class members and (2) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class?"); *Cotte v. CVI SGP Acquisition Tr.*, 2023 WL 1472428, at *7 (D. Utah Feb. 2, 2023) (noting that courts have "analyzed the adequacy of representation [under Rule 23(e)(2)(A)] by evaluating adequacy under Rule 23(a)(4)").

As the Court already determined in connection with its decision to certify the Class, there is no antagonism or conflict between Los Angeles and the Class. Los Angeles, like the other members of the certified Class, purchased share of Myriad common stock during the Class Period, and was injured by the same alleged misstatements. *Martinez v. Reams*, 2020 WL 7319081, at *6 (D. Colo. Dec. 11, 2020) (finding adequate representation where "[t]here is nothing in the record or proposed settlement agreement that raises obvious concerns regarding interclass conflicts").

Moreover, it is respectfully submitted that Los Angeles and Lead Counsel, along with the Los Angeles City Attorney, have vigorously represented the Class both by prosecuting the Action since its inception and by negotiating a favorable $77.5 million Settlement. Los Angeles is a sophisticated institutional investor that took an active role in supervising the litigation, as envisioned by the PSLRA, and strongly endorses the Settlement. A settlement reached "under the supervision and with the endorsement of a sophisticated institutional investor . . . is 'entitled to an even greater presumption of reasonableness.'" *In re Veeco Instruments Inc. Sec. Litig.*, 2007 WL

4115809, at *5 (S.D.N.Y. Nov. 7, 2007). In addition, Lead Counsel is highly qualified and experienced in securities litigation (see BLB&G Firm Resume, Ex. 4A-3) and was able to successfully conduct the litigation against skilled opposing counsel and obtain an excellent recovery for the Class.[4]

### 2. The Settlement Was Reached Through Arm's-Length Negotiations and Following Extensive Discovery

In determining whether to approve a class action settlement, courts consider whether the settlement "was negotiated at arm's length." Fed. R. Civ. P. 23(e)(2)(B).[5] The Settlement was reached only after extensive, arm's-length negotiations between experienced and informed counsel under the supervision of *two* highly experienced mediators: Judge Layn R. Phillips and Michelle Yoshida. Judge Phillips is a former Federal District Court Judge who has mediated some of the largest, most complex securities cases in history. Ms. Yoshida likewise has nearly two decades of experience as a mediator and special master, and has mediated numerous complex securities class actions. Courts in this Circuit and elsewhere have held that the involvement of an experienced mediator strongly supports the fairness of a proposed settlement, and that Judge Phillips in particular possesses considerable expertise in mediating complex cases such as this one. *In re Crocs, Inc. Sec. Litig.*, 306 F.R.D. 672, 679, 690 (D. Colo. 2014) (citing the parties' mediation before "retired United States District Judge Layn R. Phillips, who has extensive experience mediating complex cases" in support of final approval of a proposed settlement); *In re Molycorp, Inc. Sec. Litig.*, 2017 WL 4333997, at *7 (D. Colo. Feb. 15, 2017) (same); *see also In re LIBOR-*

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[4] This inquiry is analogous to the Tenth Circuit's traditional examination into "the judgment of the parties that the Settlement is fair and reasonable" *Rutter*, 314 F.3d at 1188.

[5] This inquiry is comparable to the Tenth Circuit's traditional examination of "whether the proposed settlement was fairly and honestly negotiated." *Rutter*, 314 F.3d at 1188.

*Based Fin. Instruments Antitrust Litig.*, 2016 WL 7625708, at *1 (S.D.N.Y. Dec. 21, 2016) (characterizing Judge Phillips as a "renowned" mediator); *In re Genworth Fin. Sec. Litig.*, 210 F. Supp. 3d 837, 840 (E.D. Va. 2016) (noting that Judge Phillips "has extensive experience in mediating securities fraud settlement negotiations"). As also noted above, the Settlement is the product of a joint mediators' proposal, which is further evidence of the arm's-length nature of the settlement negotiations. *See Gradie v. C.R England, Inc.*, 2020 WL 6827783, at * 10 (D. Utah Nov. 20, 2020).

Moreover, at the time the Settlement was reached, Los Angeles and Lead Counsel were knowledgeable about the strengths and weaknesses of the case, having intensely litigated this Action for almost four years. Indeed, prior to reaching the Settlement, Los Angeles had conducted an extensive investigation, including interviews of multiple former Myriad employees and the filing of a detailed amended complaint. Los Angeles litigated Defendants' motion to dismiss the Complaint, as well as a contested class certification motion. Los Angeles also completed extensive fact discovery, which included contested discovery motions, the analysis of over 1.7 million pages of documents, and the depositions of 22 fact witnesses, including Myriad's top executives, senior scientists, and key third-parties. Expert discovery was ongoing at the time of settlement and Los Angeles had obtained, and was prepared to serve, reports authored by five prominent experts in the fields of psychiatry, pharmacogenomics, statistics, financial economics, and accounting—reports that were the product of Los Angeles's detailed consultation with those experts throughout the course of the litigation. As a result, Los Angeles and Lead Counsel had a thorough and well-developed understanding of the merits and risks of the claims when they agreed to the Settlement.

### 3. The Settlement Should be Approved in Light of the Costs and Risks of Further Litigation and Similar Factors

In determining whether a settlement is "fair, reasonable, and adequate," the Court must consider whether "the relief provided for the class is adequate, taking into account . . . the costs, risks, and delay of trial and appeal" and similarly relevant factors. Fed. R. Civ. P. 23(e)(2)(C).[6]

Here, the $77.5 million Settlement Amount represents a significant recovery. As noted above, if approved, this Settlement would be the largest securities class action recovery in Utah and would rank among the top ten such recoveries in Tenth Circuit history. The Settlement provides a substantial financial benefit while eliminating the significant risk that the Class could recover less, or nothing at all, if the Action continued.

Although Los Angeles and Lead Counsel believe that the claims asserted against Defendants have merit, they recognize the substantial risks that the Class could recover far less (or even nothing) if litigation were to continue to trial. As noted above, Myriad is a "small cap" life sciences company that has reported either negative operating cash flow or a net loss in every quarter during the last four years, operating at a combined loss of over $700 million. Myriad's operating costs are, and have been, substantial, and the Company has recently relied on asset sales to fund its operations. Indeed, at the time the Parties agreed to settle the case, Myriad had less than $54 million in cash and cash equivalents on its balance sheet, and total current assets (including inventory and accounts receivable) of just over $260 million. Los Angeles estimates that, at the time the Parties reached agreement on the settlement of the Action, a complete judgment in Lead

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[6] This factor under Rule 23(e)(2)(C) encompasses two of the Tenth Circuit's traditional factors to be considered by courts when evaluating a class action settlement: "whether serious questions of law and fact exist, placing the ultimate outcome of the litigation in doubt" and "whether the value of an immediate recovery outweighs the mere possibility of future relief after protracted and expensive litigation." *Rutter*, 314 F.3d at 1188.

Plaintiff's favor would, therefore, have required Myriad to pay ***more than 8 times*** the Company's cash and securities and ***almost twice*** the Company's combined assets. In addition, the Company's financial condition was deteriorating in the months leading up to settlement, including an accelerating cash burn and mounting operating losses. Accordingly, Myriad's ability to pay a judgment or fund a settlement in excess of the Settlement in the event litigation continued for months, or even years, is, at best, highly uncertain.

Based on the advice of a financial advisor, Los Angeles structured the Settlement to take into account Myriad's ability-to-pay issues and significantly enhance the magnitude of the recovery for the Class. In particular, the Settlement seeks to maximize the recovery obtained for the Class by providing that Myriad would pay at least $20 million in cash with the flexibility to pay the balance in cash or freely tradeable common stock. Given Myriad's financial condition, a recovery of the size the Settlement would not have been possible without the creative payment structure that Los Angeles negotiated.

The continued litigation of the Action also presented several risks that Los Angeles would be unable to establish liability and damages. ¶¶109-127. In addition, trial and appeals would impose substantial additional costs on the Class and would result in extended delays—likely running to years—before any recovery. The Settlement avoids those further costs and delays. Moreover, the Settlement represents a substantial percentage of the maximum potential class-wide damages that could be realistically established at trial, and thus represents a very favorable outcome in light of the litigation risks. All of these factors strongly support the Settlement's approval.

**(a) The Risks of Establishing Liability and Damages Support Approval of the Settlement**

While Los Angeles and Lead Counsel believe that the claims asserted in the Action are meritorious, they recognize that there were risks to establishing both liability and damages.

The Action's core allegations were that Defendants violated the federal securities laws by making materially false and misleading statements about two of Myriad's most significant products during the Class Period, a pharmacogenomic test called GeneSight and genetic tests for hereditary cancer. In the absence of the Settlement, Los Angles would have faced challenges in proving the required elements of falsity and scienter.

For example, Defendants had asserted, and would continue to assert, that their statements concerning the efficacy of GeneSight's ADHD Panel or the results of the GUIDED trial were not false or, even if false, they were not made recklessly. Defendants argued, for instance, that Myriad accurately reported the results of the GUIDED trial, and that their statements about GeneSight's benefit were statements of scientific judgment and opinion and were supported by available empirical research. In addition, Defendants argued that, contrary to Los Angeles's claims that Defendants hid negative results from the GUIDED study, Myriad disclosed the study's endpoints and key results, including that GUIDED had failed its primary endpoint; as such, Defendants argued Myriad had no duty to disclose to investors exactly how many other endpoints in the study failed. Further, Defendants argued that these defenses were borne out by the fact that GeneSight, including the ADHD Panel, is currently on the market and the FDA has not taken steps to remove it. While Los Angeles believes it had meritorious responses to these arguments, it recognizes that these issues are technical and complex, and involve questions of scientific judgment that can be difficult to establish at trial.

Los Angeles also faced challenges in proving falsity and scienter with respect to its allegations that Defendants materially overstated Myriad's revenue attributable to its hereditary cancer tests ("HCT"). Defendants argued, and would continue to argue, that these statements reasonably applied accounting rules to matters of judgment, like revenue accrual, and were found to be reasonable by the Company's outside auditor. These issues, like many of the other matters in dispute, would be the subject of dueling expert opinions at summary judgment and trial.

Even assuming that Los Angeles overcame the above risks and successfully established falsity and scienter, it would have met additional challenges in satisfying its burden in proving "that [Defendants'] misrepresentations 'caused the loss for which the plaintiff seeks to recover.'" *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 345-46 (2005). While the Court rejected Defendants' loss causation arguments at the motion to dismiss and class certification stages, loss causation arguments could have presented a significant risk at summary judgment and trial, where the Court or a jury would review evidence and Defendants' position likely would have been bolstered by expert testimony opining that there was no loss causation and limited or no damages.

Defendants would continue to argue that none of the stock price declines on the alleged corrective disclosure dates could be connected to the fraud alleged in the Complaint. For instance, at the class certification stage, Defendants challenged Los Angeles's allegations that Myriad's February 2020 announcement of CEO Capone's departure from Myriad partially cured Defendants' alleged fraud, arguing that the disclosure did not reveal any new information alleged to have been concealed from investors. While the Court rejected this argument at the time and on the record before it, Defendants would have continued to vigorously contest loss causation on this date and, if successful, would have significantly limited recoverable damages in the case.

The Complaint also alleged that the FDA's October 31, 2018 Safety Communication, which raised concerns regarding the safety of pharmacogenomic tests, partially cured Defendants' fraud. Defendants would have continued to challenge this allegation on the ground that the disclosure did not mention or relate specifically to GeneSight. Defendants had similar arguments with regard to every corrective disclosure alleged in the case; if ***even one*** of their argument was successful, Class-wide damages could be substantially reduced.

**(b) The Settlement Represents a Substantial Percentage of Recoverable Damages**

The $77.5 million Settlement is also a very favorable result when considered in relation to the maximum potential damages that Los Angeles could establish at trial. Through the Settlement, investors will recover a highly significant amount, and far greater than in most securities class actions. Cornerstone Research estimates that the median securities class action settlement amount was 5% of estimated damages for the years 2013 through 2022. *See* Laarni T. Bulan & Laura E. Simmons, *Securities Class Action Settlements: 2022 Review and Analysis*, at 6, fig. 5 (Cornerstone Research 2023). Los Angeles's damages expert estimates that the maximum damages in this case—if investors were to prevail on all aspects of their claims and all corrective disclosures at trial, intra-class period gains were offset, and standard accounting methodologies applied—is approximately $450.4 million. If Defendants' loss causation arguments prevailed *just* with regard to the disclosure date they challenged at the class certification stage, maximum recoverable damages would be as much as halved, even if the jury found for Los Angeles on every aspect of all remaining disclosure dates. Thus, the $77.5 million total Settlement value represents approximately 17% of the Class's estimated damages, aggressively assuming that investors prevailed on all of the alleged misstatements during the entire Class Period—more than *three times* the national median recovery. The Settlement represents approximately 34% of the Class's

damages if Defendants prevailed on just the disclosure date they had already challenged—more than *six times* the national median recovery. Accordingly, the Settlement represents an excellent recovery for Class Members, especially considering the real risk of no-or-lesser recovery and the typical level of recovery in securities class actions. *See, e.g., In re Giant Interactive Grp., Inc.*, 279 F.R.D. 151, 162-63 (S.D.N.Y. 2011) (finding 16.5% recovery to be "in excess of the average percentage of recovery in many securities actions" as "the average . . . ranges from 3% to 7% of the class's total estimated losses"); *In re Merrill Lynch & Co. Rsch. Repts. Sec. Litig.*, 2007 WL 313474, at *10 (S.D.N.Y. Feb. 1, 2007) ("The [$40.3 million] settlement . . . represents a recovery of approximately 6.25% of estimated damages. This is at the higher end of the range of reasonableness of recovery in class actions securities litigations.").

**(c) The Costs and Delays of Continued Litigation Support Approval of the Settlement**

In addition to the specific risks faced in this Action with respect to proving liability and damages (as discussed in detail above), Los Angeles and Lead Counsel also considered the costs and delays involved in pursuing a securities class action through trial generally. In the absence of the Settlement, continued litigation of the Action would have included the completion of costly expert discovery, an expected motion for summary judgment, and a trial that would involve substantial expert and factual testimony with respect to liability and damages. No trial date has been set in the action and, as summary judgment has yet to be briefed, it is unclear when a trial would even begin. Even if Los Angeles succeeded at trial, it is virtually certain that Defendants would appeal, further delaying the receipt of any recovery by the Class. Thus, the costs necessary to prosecute the claims through trial and appeals were extensive, and continued litigation of the Action would have required a significant expenditure of the Court's time and resources. *See Lane v. Page*, 862 F. Supp. 2d 1182 (D.N.M. 2012) ("Pursuing the litigation further would require

significant judicial and party resources to complete motions for summary judgment, motions under *Daubert v. Merrell Dow Pharmaceuticals*, and motions in limine. Any of those decisions could then be appealed to the Tenth Circuit along with any jury verdict that might be returned.")

#### (d) All Other Factors Set Forth in Rule 23(e)(2)(C) Support Approval of the Settlement

Rule 23(e)(2)(C) also instructs courts to consider whether the relief provided for the class is adequate in light of "the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;" "the terms of any proposed award of attorney's fees, including timing of payment;" and "any agreement required to be identified under Rule 23(e)(3)." Fed. R. Civ. P. 23(e)(2)(C)(ii)-(iv). Each of these factors supports approval here.

First, the procedures for processing Class Members' claims and distributing the Settlement's proceeds to eligible claimants in cases of this type are well-established. In sum, the net Settlement proceeds will be distributed to eligible class members who submit required Claim Forms and supporting documentation to the Court-appointed Claims Administrator, A.B. Data, Ltd. ("A.B. Data")—a highly experienced claims administration firm. A.B. Data will (a) review and process submitted claims under the supervision of Lead Counsel, (b) provide claimants with an opportunity to cure any deficiencies and bring any unresolved claims disputes to the Court, and (c) ultimately send claimants their *pro rata* share of the Net Settlement Fund (following entry of a final "Distribution Order" by the Court).[7] This type of claims processing is standard in securities class actions (as neither Los Angles nor Myriad possess individual investors' trading data that would otherwise allow the Parties to create a "claims-free" process to distribute Settlement funds).

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[7] The Settlement is not a claims-made settlement. If the Settlement is approved, Defendants will have no right to the return of any portion of Settlement based on the number or amount of claims submitted. *See* Stipulation ¶15.

Second, the relief provided the Class under the Settlement is also adequate when the terms of the proposed attorney's fee award is considered. As discussed in the accompanying Fee Memorandum, the proposed attorneys' fees of 19% of the Settlement Fund, to be paid upon approval by the Court, is fair and reasonable in light of Lead Counsel's work and the results achieved in the face of substantial litigation risk. Moreover, nothing in the Settlement is contingent on the approval of attorneys' fees, which are subject to separate approval by the Court. *See* Stipulation ¶21.

Lastly, Rule 23 asks the Court to consider the fairness of the proposed settlement in light of any agreements required to be identified under Rule 23(e)(3). *See* Fed. R. Civ. P. 23(e)(2)(C)(iv). As discussed in connection with the motion for preliminary approval, the Parties entered into a standard supplemental agreement which provided that Myriad would have the right (but not the obligation) to terminate the Settlement in the event that, if the Court permitted a second opt-out opportunity, valid requests for exclusion from the Class in connection with the Settlement Notice exceeded the threshold set forth in that agreement. Because no second opt-out opportunity was granted, the agreement is moot. There are no other arguments between the Parties.

#### 4. The Settlement Treats Class Members Equitably Relative to Each Other

As discussed below in Part III.B., the Plan of Allocation provides that Class Members whose claims are Court-approved will receive their *pro rata* share of the recovery based on their losses resulting from their transactions in Myriad common stock during the relevant time periods. Los Angeles will receive the same level of *pro rata* recovery (based on the Plan of Allocation) as all other Class Members. This ensures equitable treatment among the Class.

**B. The Plan of Allocation is Fair and Reasonable and Should be Approved**

The objective of a plan of allocation is to provide an equitable method for distributing a settlement fund among eligible class members. Like the standard governing approval of the settlement itself, a plan for allocating settlement proceeds warrants approval if the distribution of funds is "fair, reasonable and adequate." *Crocs,* 306 F.R.D. at 692. Where, as here, an allocation plan is endorsed by competent and experienced counsel, it "need only have a reasonable, rational basis." *Lucas v. Kmart Corp.*, 234 F.R.D. 688, 695 (D. Colo. Mar. 22, 2006). Additionally, in determining whether a plan of allocation is fair, courts give substantial weight to the opinions of experienced counsel. *See, e.g.*, *Law v. NCAA*, 108 F. Supp. 2d 1193, 1196 (D. Kan. 2000). As set forth below, the Plan of Allocation is fair and reasonable and should be approved.

Here, the proposed Plan of Allocation, which was developed by Lead Counsel in consultation with Los Angeles's damages expert, is a fair and reasonable method for allocating the Net Settlement Fund among eligible Class Members who submit valid Claim Forms ("Authorized Claimants") that are approved for payment by the Court.

In developing the Plan of Allocation in conjunction with Lead Counsel, the damages expert determined estimated artificial inflation in Myriad common stock during the Class Period allegedly caused by Defendants' alleged misrepresentations and omissions. In calculating the estimated artificial inflation allegedly caused by Defendants' alleged misrepresentations and omissions, the damages expert considered price changes in Myriad common stock in reaction to certain public announcements allegedly revealing the truth concerning Defendants' alleged misrepresentations and omissions, adjusting for price changes that were attributable to market or industry forces. *See* Settlement Notice ¶69.

Under the Plan of Allocation, a "Recognized Loss Amount" or "Recognized Gain Amount" will be calculated for each purchase of Myriad common stock during the Class Period that is listed

in the Claim Form and for which adequate documentation is provided. Settlement Notice ¶71. In general, the Recognized Loss Amount will be the difference between the estimated artificial inflation on the date of purchase and the date of sale, or the difference between the actual purchase price and sales price, whichever is less. *Id.* ¶72. Claimants' Recognized Loss Amounts will be netted against their Recognized Gain Amounts, if any, to determine the Claimants' "Recognized Claims," and the Net Settlement Fund will be allocated *pro rata* to Authorized Claimants based on the relative size of their Recognized Claims. *Id.* ¶¶73, 81-82.

Los Angeles and Lead Counsel believe that the Plan of Allocation has a reasonable and rational basis for equitably allocating the Net Settlement Fund among eligible Class Members. More than 104,200 copies of the Settlement Notice, which describes the proposed Plan of Allocation in detail and advises Class Members of their right to object to the Plan of Allocation, have been sent to potential Class Members and nominees. To date, ***no objection*** to the Plan of Allocation has been received. ¶147. Accordingly, the Plan of Allocation should be approved as fair, reasonable and adequate.

### C. Notice to the Class Satisfied Rule 23 and Due Process

Notice to the Class of the proposed Settlement satisfied Rule 23's requirement of "the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Fed. R. Civ. P. 23(c)(2)(B); *see also Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173-75 (1974). The Settlement Notice also satisfied Rule 23(e)(1)'s requirement that notice of a settlement be "reasonable" —*i.e.*, it "'must be reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'" *Tennille v. W. Union Co.*, 785 F.3d 422, 436 (10th Cir. 2015) (quoting *Eisen*, 417 U.S. at 174).

Here, both the Settlement Notice's substance and the method of its dissemination to potential Class Members easily satisfied these standards. The Court-approved Settlement Notice contains all the information required by Rule 23(c)(2)(B) and the PSLRA, 15 U.S.C. §78u-4(a)(7), including: (i) the nature of the Action and the claims asserted; (ii) the definition of the Class; (iii)the Settlement's basic terms, including the amount of the consideration and the releases to be given; (iv) the Plan of Allocation; (v) the reasons why the Parties are proposing the Settlement; (vi) the maximum amount of attorneys' fees and expenses that will be sought; (vii) a description of the Class Members' right to object to the Settlement, the Plan of Allocation, or the requested attorneys' fees or expenses; and (viii) notice of the binding effect of a judgment on Class Members. The Settlement Notice also provides information on how to submit a Claim Form in order to potentially receive a distribution from the Net Settlement Fund.

In accordance with the Preliminary Approval Order (ECF No. 285), as of November 2, 2023, the Court-approved Claims Administrator, A.B. Data, has mailed more than 104,200 copies of the Settlement Notice Packet by first-class mail to potential Class Members and nominees. *See* Ewashko Decl., Ex. 3, ¶5. In addition, October 2, 2023, A.B. Data caused the Summary Settlement Notice to be published in the national edition of the *Wall Street Journal* and to be transmitted over the *PR Newswire*. *Id*. ¶6. A.B. Data also updated the website dedicated to the Action, www.MyriadGeneticsSecuritiesLitigation.com, to provide potential Class Members with information about the Settlement and the applicable deadlines, as well as access to downloadable copies of the Notice (including the Plan of Allocation), Claim Form, Stipulation, and Preliminary Approval Order. *Id*. ¶14.

This combination of individual notice by first-class mail to all members of the Class who could be identified with reasonable effort, supplemented by notice in a widely circulated

publication, transmission over a newswire, and availability on internet websites, was "the best notice . . . practicable under the circumstances." Fed. R. Civ. P. 23(c)(2)(B); *see, e.g.*, *Crocs*, 306 F.R.D. at 693; *In re Advanced Battery Techs., Inc. Sec. Litig.*, 298 F.R.D. 171, 182-83 (S.D.N.Y. 2014).

## IV. CONCLUSION

Based on the foregoing and the declarations submitted herewith, Los Angeles respectfully submits that the Settlement and Plan of Allocation are fair, reasonable and adequate, and respectfully request that the Court grant final approval of the Settlement and the Plan of Allocation. A proposed Judgment and Order granting the requested relief will be submitted with Los Angeles's reply papers after the deadline for objecting to the Settlement and Plan of Allocation has passed.

Dated: November 3, 2023

Respectfully submitted,

*/s/ Abe Alexander*

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## CERTIFICATE OF SERVICE

I certify that on the 3rd of November, 2023, I caused to be served a true and correct copy of the foregoing **LEAD COUNSEL'S MOTION FOR AN AWARD OF ATTORNEYS' FEES AND LITIGATION EXPENSES, AND MEMORANDUM OF LAW IN SUPPORT THEREOF**, with the Clerk of the Court using the CM/ECF systems that will send an electronic notification to all counsel of record.

/s/ Abe Alexander
Abe Alexander