UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE HELIOS AND MATHESON ANALYTICS, INC. SECURITIES LITIGATION	Case No. 1:18-CV-06965-JGK **CLASS ACTION**

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

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Pursuant to Federal Rule of Civil Procedure ("Rule") 23(e), Lead Plaintiff Helios and Matheson Investor Group ("Lead Plaintiff"), comprised of George Hurst, Marcus Washington, Daniel Mercer, Juan Taveras, and Amit Katiyar ("Plaintiffs"), on behalf of themselves and the Settlement Class,[1] submit this memorandum of law in support of their motion for: (1) final approval of the proposed Settlement in the above-captioned securities class action (the "Action"); (2) approval of the proposed plan of allocation of the proceeds of the Settlement (the "Plan of Allocation"); and (3) final certification of the Settlement Class.

PRELIMINARY STATEMENT

Subject to this Court's approval, the proposed Settlement resolves all claims alleged in the Action against Theodore Farnsworth, Stuart Benson, and Mitch Lowe (the "Individual Defendants")[2] in exchange for a $8,250,000 cash payment (the "Settlement Amount") to the

[1] All capitalized terms not defined herein shall have the meaning set forth in the Stipulation and Agreement of Settlement dated December 11, 2020 (ECF 126-1, the "Stipulation"), and the Declaration of Shannon L. Hopkins in Support of (1) Lead Plaintiff's Motion for Final Approval of Class Action Settlement and Plan of Allocation and Final Certification of Settlement Class, and (2) Lead Counsel's Motion for an Award of Attorneys' Fees, Reimbursement of Expenses, and Incentive Awards to Lead Plaintiff (the "Hopkins Declaration" or "Hopkins Decl."). Unless otherwise noted, all emphasis is added, all internal quotations and citations are omitted, and all citations to "¶ __" and "Ex." refer, respectively, to paragraphs in, and exhibits to, the Hopkins Declaration.

The Hopkins Declaration is an integral part of this submission and, to avoid undue repetition in this memorandum, the Court is referred to it for factual background, a detailed history of the efforts undertaken by Lead Plaintiff and Lead Counsel during the course of this litigation and settlement negotiations, dissemination of Notice, and further factors bearing on the reasonableness and fairness of the Settlement and Plan of Allocation.

[2] Helios and Matheson Analytics, Inc. ("Helios" or the "Company") filed a voluntary Chapter 7 Petition on January 28, 2020 (*In re Helios and Matheson Analytics, Inc., a/k/a MovieFone, et al.,* Case No. 20-10242-SMB (Bankr.

Settlement Class. Lead Plaintiff submits the proposed Settlement satisfies all Rule 23 standards and is fair, reasonable, and adequate in light of the significant risks and expenses of continued litigation, including the risk of recovering less than the Settlement Amount, or nothing at all. The Settlement was reached only after two years of hard-fought litigation and extensive arm's-length negotiations among the Parties, and with the assistance of a highly-experienced mediator, David Murphy, Esq. ("Murphy" or "Mediator"), of Phillips ADR. The mediation process included a presentation by Lead Counsel to counsel for the Individual Defendants and Defendants' insurance carriers followed by a question-and-answer session; detailed written mediation statements and reply statements concerning liability, damages, and coverage; a full-day mediation session; and additional weeks of negotiations facilitated by Mr. Murphy, until he issued a double-blind recommendation to settle the Action for the Settlement Amount that the parties accepted.

As described below and in the Hopkins Declaration, before accepting the Settlement, Lead Plaintiff and Lead Counsel had a well-developed understanding of the strengths and weaknesses of the case, enabling them to appropriately evaluate the Settlement's fairness, reasonableness, and adequacy. Lead Plaintiff's Counsel had engaged in a thorough factual investigation that included, among other things, the review and analysis of: (i) press releases, news articles, transcripts, and other public statements issued by or concerning Helios, MoviePass, and the Individual Defendants; (ii) research reports issued by financial analysts concerning Helios's business; (iii) Helios's filings with the U.S. Securities and Exchange Commission ("SEC"); (iv) docket entries from civil actions involving Defendants filed in courts around the country, including filings in the Bankruptcy; (v) documents concerning regulatory actions involving Defendants, including records received pursuant to the state of New York's Freedom of Information Law; (vi) review and analysis of the

S.D.N.Y.)) (the "Bankruptcy"), and a notice of automatic stay, ECF 101, and therefore is not a party to this Settlement.

Bankruptcy Trustee's derivative complaint that cited numerous internal Company documents supporting the claims asserted in this Action; and (vii) other publicly available information and data concerning Helios, its securities, and the markets therefor. ¶¶5, 21. As part of their investigation and in furtherance of their allegations against Defendants, Lead Counsel contacted and interviewed numerous former employees of Helios and MoviePass; consulted with an expert on damages and loss causation relating to Lead Plaintiff's claims; and conferred with a financial valuation expert regarding the Trustee's damages claim in the Adversary Proceeding which competed with Lead Plaintiff for limited insurance coverage. ¶21, ¶81. Lead Plaintiff also filed a motion to lift the discovery stay to obtain the same books and records that the Bankruptcy Trustee relied upon in his complaint. ¶31.

While Lead Plaintiff believes its claims have merit, there was no guarantee of success on Defendants' motion to dismiss. Even if Lead Plaintiff successfully defeated the motion, the Individual Defendants would likely continue to press their arguments at summary judgment, trial, through appeals, and Lead Plaintiff would face substantial risks and expense in demonstrating, among other things, the materiality and falsity of Defendants' statements, scienter, loss causation, and damages during such later proceedings. Helios's Chapter 7 liquidation rendered recovery against the Company impossible, and the Individual Defendants' depleting insurance heightened the risk that Lead Plaintiff might recover less, or nothing at all. Weighed against such risks, the Settlement is an outstanding result for the Settlement Class.

The Settlement has the approval of each Plaintiff—five investors with almost six decades of combined investing experience who took an active role in monitoring and supervising the litigation. Exs. 4-8. The reaction of the Settlement Class further confirms the fairness, reasonableness, and adequacy of the Settlement. Specifically, Lead Plaintiff has only received

three requests for exclusion, and two purported objections to the settlement. ¶¶51-55. As discussed below, neither the exclusions nor the objections are valid because, among other reasons, they failed to provide proof of membership in the Settlement Class. Accordingly, Lead Plaintiff respectfully requests that the Court grant final approval of the Settlement and certify the Settlement Class for purposes of settlement only pursuant to Rules 23(a) and 23(b)(3) as nothing has changed to alter the Court's preliminary certification.

Lead Plaintiff also requests that the Court approve the proposed Plan of Allocation, as set forth in the Notice published on the Settlement website. The Plan of Allocation, which was developed by Lead Counsel in consultation with Lead Plaintiff's damages expert, fairly distributes the Net Settlement Fund in accordance with the claims in this litigation, providing each Settlement Class member who files a valid claim a *pro rata* share based upon his or her Recognized Loss. It is substantively similar to plans that have been approved and used to allocate recoveries in other securities class actions, and to date there have been zero objections to the Plan of Allocation. Accordingly, the Plan of Allocation is fair, reasonable, and adequate and warrants final approval.

ARGUMENT

I. THE PROPOSED SETTLEMENT WARRANTS FINAL APPROVAL

A. Legal Standards

Rule 23(e) provides that class action settlements obtain court approval. Public policy strongly favors settlement, "particularly in the class action context." *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 116-17 (2d Cir. 2005); *see also Fleisher v. Phoenix Life Ins. Co.*, 2015 WL 10847814, *4 (S.D.N.Y. 2015) (similar). "A court may approve a class action settlement if it is fair, adequate, and reasonable, and not a product of collusion." *Wal-Mart*, 396 F.3d at 116. When analyzing a settlement's fairness, the court should "not decide the final merits of the case or resolve unsettled legal questions." *Carson v. Am. Brands*, 450 U.S. 79, 88 n.14 (1981).

To determine if a settlement is fair, reasonable, and adequate Rule 23(e)(2) requires courts to consider:

(A) whether the class representatives and class counsel have adequately represented the class;

(B) whether the proposal was negotiated at arm's length;

(C) whether 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 attorneys' fees, including timing of payment; and

iv. any agreement required to be identified under Rule 23(e)(3); and

(D) whether the proposal treats class members equitably relative to each other.

These factors consider the "negotiating process leading up to the settlement, i.e., procedural fairness," contemplated by Rules 23(e)(2)(A) through (B), "as well as the settlement's substantive terms, i.e., substantive fairness" enumerated in Rules 23(e)(2)(C) through (D). *In re Platinum & Palladium Commod. Litig.*, 2014 WL 3500655, *11 (S.D.N.Y. 2014).

Courts also consider the Second Circuit's traditional factors for assessing of the fairness, reasonableness, and adequacy of class action settlements (some of which overlap with the Rule 23(e)(2) factors) articulated in *City of Detroit v. Grinnell Corp*., 495 F.2d 448, 463 (2d Cir. 1974) (the "*Grinnell* factors"), which include: (1) the complexity, expense, and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings and the amount of discovery completed; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining the class action through the trial; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery; and (9) the range of reasonableness of the settlement fund in

light of all the attendant risk of litigation. *Id.*; Advisory Committee Notes to 2018 Rule 23 Amendments (Rule 23(e)(2)'s factors do not "displace" factors previously adopted by courts of appeals). Satisfaction of all of the *Grinnell* factors is not required, "rather the court should consider the totality of these factors[.]" *In re Hi-Crush Partners L.P. Sec. Litig.*, 2014 WL 7323417, at *5 (S.D.N.Y. 2014).

As was true at preliminary approval, the Settlement satisfies each of the Rule 23(e)(2) and *Grinnell* factors. Since little has changed, the Settlement is fair, reasonable, and adequate and thus warrants this Court's final approval. *See In re GSE Bonds Antitrust Litig.*, 2020 WL 3250593, at *1 (S.D.N.Y. 2020) (considering only on "those few developments since" preliminary approval and finally approving settlement since the Court "already explained" that the settlement satisfied the Rule 23 and *Grinnell* factors).

B. The Settlement Satisfies Rule 23(e)(2)(A) and *Grinnell* Factor Three: The Class Is Adequately Represented

Lead Plaintiff's hard-fought litigation efforts have adequately represented the Class. Lead Plaintiff took an active role in supervising the litigation and recommending that the Settlement be approved. *See* Exs. 4-8. Moreover, Lead Plaintiff's interests are the same as the Class's. Lead Plaintiff and Settlement Class members purchased shares of the same stock, based on the same materially false and misleading statements or omissions, made by the same Defendants, and have the same interest in obtaining the largest recovery possible. *See In re Signet Jewelers Ltd. Sec. Litig.*, 2020 WL 4196468, at *2 (S.D.N.Y. 2020) ("adequacy requirement entails inquiry as to whether: 1) plaintiffs' interests are antagonistic to the interest of other members of the class"); *Jiangchen v. Rentech, Inc.*, 2019 WL 5173771, *5 (C.D. Cal. 2019) (no conflict where "plaintiffs and class members share the common goal of maximizing recovery").

Lead Plaintiff also adequately represented the class by selecting qualified counsel. *Signet*, 2020 WL 4196468, at *2; *Chin v. RCN Corp.*, 2010 WL 3958794, *3 (S.D.N.Y. 2010) (settlement "procedurally fair" where "experienced and capable" counsel retained). Here, Lead Plaintiff is represented by L&K, an experienced firm skilled in securities litigation with a long and successful track record in such cases. Ex. 2. Bragar, Eagel & Squire P.C. contributed to the prosecution of the claims, including by providing counsel experienced in bankruptcy proceedings to assist in advising on issues related to the impact of Helios' bankruptcy and the Trustee litigation on this Action (if any). Ex. 3. Lead Counsel believes that the Settlement is an excellent result for the Class given the attendant risks and costs in the ongoing litigation and recommends that the Settlement be finally approved. *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[.]").

Lead Plaintiff's Counsel also adequately represented the Class by, *inter alia*, thoroughly investigating the allegations in the TAC for over two years before reaching the Settlement. *In re Bear Stearns Cos.*, 909 F. Supp. 2d 259, 267 (S.D.N.Y. 2012) (third *Grinnell* factor considers "whether the parties had adequate information" to evaluate claims, defenses, and value of the settlement). This investigation included, among other things, an extensive review and analysis of all public filings and other available information concerning the Defendants; interviews with third-party witnesses including former employees of Helios and/or MoviePass; preparation of three detailed complaints; briefing on two motions to dismiss; review of allegations in the Bankruptcy Trustee's derivative complaint citing and quoting internal Company documents concerning Lead Plaintiff's allegations, consultation with damages and market efficiency experts; and review and analysis of court filings in numerous judicial proceeds, including the Bankruptcy. ¶5, ¶21; *see also* Ex. 2 at ¶16 (Mediator recognized Lead Counsel was well-informed).

Given intense interest from shareholders and consumers in the Company's business, the Individual Defendants' frequent participation in interviews, the significant rise of Helios's stock price, and the rapid descent of the Company culminating in the Bankruptcy, there was a large trove of information that became publicly available concerning the TAC's allegations. Lead Counsel learned additional information regarding the Individual Defendants' potential arguments and defenses in connection with the mediation. Accordingly, Plaintiffs' Counsel were well-informed about the strengths and weaknesses of the Action, enabling them to appropriately consider the terms of the Settlement, the risks associated with continued litigation, and ultimately, the Settlement's fairness, reasonableness, and adequacy. *See, e.g., Vaccaro v. New Source Energy Partners L.P*, 2017 WL 6398636, at *5 (S.D.N.Y. Dec. 14, 2017) (although no "formal discovery" occurred, counsel's investigation permitted reasonable assessment of settlement); *In re China Sunergy Sec. Litig.*, 2011 WL 1899715, *4 (S.D.N.Y. 2011) (same); *In re Advanced Battery Techs. Inc. Sec. Litig.*, 298 F.R.D. 171, 177 (S.D.N.Y. 2014) (adequate investigation although "no merits discovery occurred").

C. The Settlement Satisfies Rule 23(e)(2)(B): The Proposed Settlement Was The Result Of Fair, Arm's-Length Negotiations

A strong presumption of fairness attaches where a settlement is "reached by experienced counsel after arm's length negotiations." *Advanced Battery*, 298 F.R.D. at 179. The Settlement is entitled to this presumption because it was achieved after arm's-length negotiations by well-informed and experienced counsel on both sides.[3]

Moreover, the Settlement was facilitated by a highly experienced mediator who reviewed detailed submissions that briefed a full spectrum of issues including the Action's merits, damages,

[3] Defendants were represented by sophisticated counsel at Greenberg Traurig, LLP.

collectability, and insurance coverage defenses. The mediator, Mr. Murphy, has declared that it is his "professional opinion that the Settlement is the product of vigorous and independent advocacy and is the product of arms-length negotiations conducted in good faith by the parties." Ex. 2 at ¶16 (Murphy Decl.). The procedurally fair manner in which this Settlement was reached strongly favors approval. *Palacio v. E*Trade Fin. Corp.*, 2012 WL 1058409, *1 (S.D.N.Y. 2012) (settlement "non-collusive" where assisted by an experienced class action mediator); *Singh v. Orthofix Int'l N.V., et al.,* Case No. 1:13-cv-5696-JGK at Dkt. No. 131 (S.D.N.Y. Apr. 29, 2016) (Koeltl, J.) (settlement fair where "negotiated with the assistance of an experienced mediator").

D. The Settlement Satisfies Rule 23(e)(2)(C)(i): The Settlement is Substantively Fair, Reasonable, and Adequate When Considering the Costs, Risks, and Delay of Continued Litigation

Rule 23(e)(C)(i) examines the "costs, risks, and delay of trial and appeal" in determining a settlement's adequacy. Examination of this factor incorporates seven of the nine *Grinnell* factors: the complexity, expense, and likely duration of the litigation (factor one); the risks of establishing liability and damages, and maintaining the class action through trial (factors four, five, and six); the ability of defendants to withstand a greater judgment (factor seven); and, the range of reasonableness of the settlement fund in light of the best possible recovery and attendant risks of the litigation (factors eight and nine). Each of these factors support approval of the Settlement.

1. The Settlement Satisfies *Grinnell* Factors One, Four, Five, Six: Further Litigation Would Have Been Complex, Risky, Expense, Lengthy, And Could Have Posed Significant Legal Challenges

In general, "the more complex, expensive, and time consuming the future litigation, the more beneficial settlement becomes as a matter of efficiency to the parties and to the Court." *In re Citigroup Inc. Sec. Litig.*, 2014 WL 2112136, at *3 (S.D.N.Y. 2014). Securities class actions are "a breed of litigation that courts have recognized as 'notably difficult and notoriously uncertain.'" *Pa. Pub. Sch. Emples.' Ret. Sys. v. Bank of Am. Corp.*, 318 F.R.D. 19, 24 (S.D.N.Y. 2016); *see*

also In re Flag Telecom Holdings, Ltd. Sec. Litig., 2010 WL 4537550, at *15 (S.D.N.Y. 2010) ("[s]ecurities class actions are generally complex and expensive"). This Action is no exception.

As discussed in the Hopkins Declaration and herein, complex issues related to scienter, loss causation, and damages, among others, are prevalent here. When the Settlement was reached, Defendants' motion to dismiss was ripe for adjudication and could have resulted in a complete dismissal. *Cf.*, Ex. 3 (NERA Report) at 11 ("The number of cases dismissed in 2020 also set a new 10-year record with approximately 6% more cases dismissed than in 2018, the second highest year in the period."). Moreover, Lead Plaintiff still had to achieve class certification,[4] withstand summary judgment and pre-trial motions, prepare for and obtain a verdict in a lengthy jury trial on liability, litigate post-trial motions and bifurcated trials on damages, and withstand lengthy appeals. *See In re AOL Time Warner Inc.*, 2006 WL 903236, at *11 (S.D.N.Y. 2006) (noting that "[t]he difficulty of establishing liability is a common risk of securities litigation"). These hurdles are no small task and would take "substantial time and expense." *Signet*, 2020 WL 4196468, *5.

Defendants emphatically challenged the sufficiency of Lead Plaintiff's claims, including that Defendants' misstatements were not materially misleading, that the alleged misrepresentations were forward looking statements protected by the Private Securities Litigation Reform Act of 1995 (the "PSLRA") and statements of opinions and puffery, and that Defendants did not act with the requisite scienter. ¶27. At class certification, summary judgment, and trial Defendants would have undoubtedly argued that the alleged misstatements were not the cause of Lead Plaintiff's losses. Defendants made colorable arguments that investors who purchased Helios stock after the first alleged disclosure on October 11, 2017 could not prove loss causation and damages. On October

[4] *See also In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 460 (S.D.N.Y. 2004) ("[E]ven if plaintiffs could obtain class certification, there could be a risk of decertification at a later stage.")

11, 2017, the Company issued risk factors related to MoviePass's business model. ECF 92 at ¶¶357-63. Defendants contended throughout the litigation that, because the alleged corrective disclosures after October 11 did not reveal any "new" information—a classic truth on the market defense—Lead Plaintiff could not show loss causation and had no damages after this date. If Defendants were successful, the Class Period would have been shortened to only two months and damages significantly reduced. Furthermore, Defendants' filings indicated that in future proceedings they would challenge whether the market for Helios securities was efficient. *See e.g.*, ECF 81 at 10-11, ECF 95 at 17.

Risks like these militate in favor of settlement, because "it is difficult to predict" how juries will decide difficult issues like scienter and damages in complex securities class actions. *In re Veeco Instruments Inc. Sec. Litig*., 2007 WL 4115809, at *9 (S.D.N.Y. 2007). Even on the best facts, loss causation and damages issues are often an unpredictable and expensive "battle of the experts." *Signet*, 2020 WL 4196468 at *11.

Given the complexities and risks inherent in continued litigation, the proposed cash Settlement of $8.25 million warrants approval. *Advanced Battery*, 298 F.R.D. at 176 ("the present value of a certain recovery at this time, compared to the slim chance for a greater one down the road, supports approval").

2. The Settlement Satisfies *Grinnell* Factor Seven: Defendants' Ability to Withstand a Greater Judgment

This factor strongly favors approval as it is doubtful Defendants could withstand a greater judgment. Courts have recognized that "[t]his factor typically weighs in favor of settlement where a greater judgment would put defendant at risk of bankruptcy or other severe economic hardship." *AOL Time Warner*, 2006 WL 903236, at *12. Helios is not "at risk" of bankruptcy—it is bankrupt and will be dissolved. Shareholders have been deemed unsecured creditors in the Bankruptcy and

counsel for the Trustee informed Lead Plaintiff that it "anticipates that the dividend for subordinated unsecured claims such as [Lead Plaintiff's] will be 0 percent." ¶66. Further, the "main settlement funds available to" Plaintiffs were "the insurance proceeds" which were limited to begin with, and "would largely be consumed by defense costs if [the] litigation were to continue." *Global Crossing*, 225 F.R.D. at 460. That is, if coverage was not disclaimed. *Cf.*, *In re Rent-Way Sec. Litig.*, 305 F. Supp. 2d 491, 507 (W.D. Pa. 2003) (because claim alleged fraud "insurer had a potentially viable argument for excluding coverage.").

Furthermore, claimants against the policy proceeds included not only the Class, but also the Trustee who was armed with the Company's books and records. Claimed damages in both this Action and the Trustee's action far exceeded the available coverage. Moreover, Defendants also face ongoing and costly proceedings initiated by regulators including the New York Attorney General, District Attorneys in California, and the SEC. *See* Bankr. Dkt. 1. This *Grinnell* factor strongly supports approval.

3. The Settlement Satisfies *Grinnell* Factors Eight, Nine: The Settlement Amount is Reasonable in Light of the Best Possible Recovery and the Attendant Risks of Litigation

Courts typically analyze the last two *Grinnell* factors together, "considering and weighing the nature of the claim, the possible defenses, the situation of the parties, and the exercise of business judgment in determining whether the proposed settlement is reasonable." *See Grinnell*, 495 F.2d at 462-63. Determining reasonableness "does not involve the use of a mathematical equation[.]" *Bear Stearns*, 909 F. Supp. 2d at 269. Instead, the determination is whether a settlement falls within a range which "recognizes the uncertainties of law and fact in any particular case[.]" *Wal-Mart*, 396 F.3d at 119.

The Settlement provides an immediate cash recovery of ***$8,250,000***. This favorable result is well-within reasonableness to warrant final approval. Lead Plaintiff's damages expert estimates

that if Lead Plaintiff fully prevailed on its claims at both summary judgment and trial, and if the Court and jury accepted Lead Plaintiff's damages theory (including proof of loss causation, which would be hotly contested) on *eight* alleged corrective disclosures—i.e., Lead Plaintiff's ***best case scenario***—the maximum estimated theoretical damages would be approximately $367.9 million. Hopkins Decl. at ¶¶68-69. Under Lead Plaintiff's estimated best-case scenario, assuming a 100% claims take rate and no disaggregation of confounding information, the Settlement represents approximately a 2.2% recovery. *Id.* The Settlement Amount is in line with the median ratio of settlement amounts to investor losses for the last nine years, which ranged from 1.6% to 2.5% between 2012 and 2020. Ex. 3 (NERA Report) at 20; *see also Citigroup*, 2014 WL 2112136, at *5 (finding $8.5 million settlement, equal to 2% of estimated losses, was "squarely within this range of reasonableness"); *In re Initial Public. Offering Sec. Litig.*, 671 F. Supp. 2d 467, 483-85 (S.D.N.Y. 2009) (settlement equal to 2% of expected recovery reasonable).

However, a full damages recovery was unlikely. A settlement's adequacy is not based on the "best of all possible worlds, but rather in light of the strengths and weaknesses of the plaintiff[s'] case.'" *In re Giant Interactive Grp., Inc.*, 279 F.R.D. 151, 162 (S.D.N.Y. 2011). As discussed above, Defendants made colorable arguments related to loss causation and damages that could have significantly reduced damages. If total damages were limited to those caused by the October 11, 2017 corrective disclosure (approximately $55.6 million), the Settlement represents a ***14.8***% recovery. ¶69; *see also In re Virtus Inv. Partners, Inc. Sec. Litig.*, 2018 WL 6333657, *3 (S.D.N.Y. 2018) ("possibility that at least some of the corrective disclosures would not have survived" a dispositive motion supported settlement's reasonableness); *In re Merrill Lynch & Co., Inc. Rsch. Rep. Sec. Litig.*, 2007 WL 313474, at *10 (S.D.N.Y. 2007) (recovery of approximately 6.25% was "at the higher end of the range of reasonableness").

The uncertainties of continued litigation and the Bankruptcy posed a considerable risk that the Class would receive smaller recovery or no recovery at all. While the Settlement of $8,250,000 would be a good recovery in any securities litigation case because it provides immediacy and certainty of recovery while eliminating all risks and costs of continued litigation, it is particularly outstanding here given the Chapter 7 Bankruptcy. *In re Facebook, Inc., IPO Sec. & Derivative Litig.*, 343 F. Supp. 3d 394, 414 (S.D.N.Y. 2018) ("the risk of zero-or minimal-recovery scenario are real.").

E. The Remaining Rule 23(e)(2) and *Grinnell* Factors Support Final Approval

1. *Grinnell* Factor Two: The Class's Positive Reaction Supports Final Approval

The reaction of the Settlement Class to the Settlement is "perhaps the most significant" factor for the Court to weigh when considering the Settlement's adequacy. *Bear Stearns*, 909 F. Supp. 2d at 266. In accordance with the Court's Preliminary Approval of Class Action Settlement, Approving Form and Manner of Notice, and Setting Date for Hearing on Final Approval of Settlement (ECF 128, the "Preliminary Approval Order"), as of March 30, 2021, JND Legal Administration ("JND") has mailed over 136,726 Postcard Notices to prospective Settlement Class members and nominees and issued the Publication Notice. Ex. 1, ¶¶10-11 (Declaration of Luiggy Segura ("Segura Decl.")). The Settlement Class's reaction has overwhelming supported the settlement.

Although the opt-out/exclusion and objections deadlines have not yet passed,[5] not a single valid request for exclusion or objection has been lodged to date. JND has only received three

[5] The deadline to for objections and exclusions is April 15, 2021. Exclusions and objections to this motion will be addressed in Lead Plaintiff's reply which is to be filed with the Court on or before April 29, 2021.

requests for exclusion, yet none comply with the requirements contained in the Notice as they lack any transaction information confirming whether the individuals were members of the Settlement Class. *Id.* at ¶¶51-53. Furthermore, two of the exclusion requests were unsigned and submitted by email in violation of the instructions in the Notice. *Id.* at ¶51, ¶53. Further, only two individuals have informed Lead Counsel that they intend to file an objection—yet neither has provided any proof that they are members of the Settlement Class, and neither has articulated the grounds for why the Settlement should not be approved. These objections should be overruled for lack of standing and lack of merit. See *Christine Asia Co. v. Yun Ma*, 2019 WL 5257534 at *11 n. 3 (S.D.N.Y. 2019) ("Only Class members have standing to object"); *In re Initial Public Offering Sec. Litig.*, 2011 WL 3792825, *1 (S.D.N.Y. 2011) (where objector "was not 'damaged' by his purchase of deCode stock, he falls outside the definition of a class member, and therefore lacks standing to object to the settlement"); *see also*, Fed. R. Civ. P. 23(e)(5).

The overwhelming support of Settlement Class members and "small number" of objections strongly evidences that the Settlement is fair, reasonable, and adequate. *Wal-Mart*, 396 F.3d at 118; *New Source*, 2017 WL 6398636, at *4 (same); *AOL Time Warner*, 2006 WL 903236, at *10 ("small number of objections and low percentage of opt-outs here strongly favor the Settlement"); *Bear Stearns*, 909 F. Supp. 2d at 267 (exclusion rate of 5.1% and objection rate of less than 1% supported approval).

2. The Remaining Rule 23(e)(2)(C) Factors Support Final Approval

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 also supports approval of the Settlement or is neutral and does not suggest any basis for inadequacy of the Settlement.

First, the procedures for processing Class Members’ claims and distributing the proceeds of the Settlement to eligible claimants are well-established, effective methods that have been widely used in securities class-action litigation. Here, the proceeds of the Settlement will be distributed to class members who submit eligible Claim Forms with required documentation to the Court-appointed Claims Administrator, JND. JND is an independent company with extensive experience handling the administration of securities class actions, including in this District. JND will provide claimants with an opportunity to cure any deficiencies in their claims or request review of the denial of their claim by the Court, and will then disburse to claimants their *pro rata* share of the Net Settlement Amount upon approval of the Court.[6] This type of claims processing is standard in securities class actions and has long been effective.

Second, the relief provided for the Class in the Settlement is also adequate when the terms of the proposed award of attorney’s fees are considered. Lead Counsel’s request for attorneys’ fees equaling 25% of the Settlement Fund, to be paid upon approval by the Court, are reasonable in light of the efforts of Plaintiffs’ Counsel and the risks in the litigation. *In re Electrobras Sec. Litig.*, Case No. 1:15-cv-5754-JGK, Dkt. No. 142 (S.D.N.Y. Dec. 12, 2018) (Koeltl, J.) (awarding 25% of settlement fund); *see also Giant Interactive*, 279 F.R.D. at 163 (awarding 33% of $13 million settlement); *Maley v. Del Glob. Techs. Corp.*, 186 F. Supp. 2d 358, 367-68 (S.D.N.Y. 2002) (awarding 33-1/3% of $1.25 million settlement). Most importantly with respect to the Court’s consideration of the fairness of the Settlement, is the fact that approval of attorneys’ fees are

[6] 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 the Settlement based on the number or value of claims submitted. *See* Stipulation ¶12.

entirely separate from approval of the Settlement, and neither Lead Plaintiff nor Lead Counsel may terminate the Settlement based on any ruling with respect to attorneys' fees. *See* Stipulation ¶19.

Third, Rule 23(e)(2)(C)(iv) requires consideration of any agreement required to be identified under Rule 23(e)(3). As the Court is aware, the Parties entered into a Confidential Supplemental Agreement Regarding Requests for Exclusion ("Supplemental Agreement") in connection with the Settlement. *See* Stipulation ¶42(a). The Supplemental Agreement provides conditions under which the Individual Defendants shall have the sole option to terminate the Settlement and render the Stipulation null and void. This option rests on the event that requests for exclusion from the Class exceed certain agreed-upon terms. The Court was provided with an unredacted copy of the Supplemental Agreement on December 23, 2020. ECF 127.

3. Rule 23(e)(2)(D) Supports Final Approval

The proposed Settlement treats members of the Class equitably relative to one another. As discussed below in Section II, pursuant to the Plan of Allocation, eligible claimants approved for payment by the Court will receive their *pro rata* share of the recovery based on their purchases or acquisitions of Helios common stock during the Class Period. Lead Plaintiff will be entitled to receive the same *pro rata* recovery as all other Class Members.

II. THE PLAN OF ALLOCATION IS FAIR, REASONABLE, AND ADEQUATE

A plan for allocating settlement proceeds, like the settlement itself, should be approved if it is fair, reasonable, and adequate. *In re IMAX Sec. Litig.*, 283 F.R.D. 178, 192 (S.D.N.Y. 2012); *Bear Stearns*, 909 F. Supp. 2d at 270. A plan of allocation need not be "tailored to" every class member with "mathematical precision." *In re PaineWebber Pshps. Litig.*, 171 F.R.D. 104, 133 (S.D.N.Y. 1997). A plan of allocation is fair and reasonable as long as it has a "rational basis." *Bear Stearns.*, 909 F. Supp. 2d at 270; *Flag Telecom*, 2010 WL 4537550, at *21. In determining whether a plan of allocation is reasonable, courts give great weight to the opinion of experienced

counsel. *See Giant Interactive*, 279 F.R.D. at 163; *In re Marsh & McLennan Companies, Inc. Sec. Litig.*, 2009 WL 5178546, at *13 (S.D.N.Y. 2009) (same).

The Plan of Allocation, as set forth in the Notice posted on the Settlement website, meets this standard. ECF 129-1 at ¶¶64-76. The Plan, developed by Lead Counsel with the assistance of its damages expert, is a fair and reasonable method for allocating the Net Settlement Fund among Settlement Class members. ¶10. Specifically, the Plan of Allocation calculates a "Recognized Loss" amount for each Settlement Class member which depends on several factors, including when a Settlement Class member purchased or otherwise acquired shares of Helios, when the shares were sold, the purchase and sale prices, and the per share amount of artificial inflation in the price of the Company's stock. ¶70; *see Hi-Crush*, 2014 WL 7323417, at *10 ("plans that allocate money depending on the timing of purchases and sales of the securities at issue are common"). The Net Settlement Fund will be allocated to eligible claimants on a *pro rata* basis based on the relative size of their Recognized Claims. *See Global Crossing*, 225 F.R.D. at 462 ("Pro-rata distribution of settlement funds based on investment loss is clearly a reasonable approach.").

Lead Plaintiff and Lead Counsel believe that the proposed Plan of Allocation will result in a fair and equitable distribution of the Net Settlement Fund among Settlement Class members who suffered losses as a result of the conduct alleged in the Action. Moreover, the Plan of Allocation was fully disclosed in the Notice posted on the Settlement website. To date, no objections to the Plan of Allocation have been received. ¶10; *Veeco*, 2007 WL 4115809, at *13–14 (favorable reaction to plan of allocation supports approval). For these reasons, Lead Plaintiff respectfully requests that the Court approve the proposed Plan of Allocation.

III. THE NOTICE TO THE SETTLEMENT CLASS COMPLIED WITH RULE 23, THE PSLRA, AND DUE PROCESS

The Notice provided to the Settlement Class satisfies the requirements of Rules 23(c)(2)(B) and 23(e), the PSLRA and due process. Rule 23 directs that the notice be "the best notice that is practicable," and that it be made "in a reasonable manner[.]" Fed. R. Civ. P. 23(c)(2)(B); Fed. R. Civ. P. 23(e). This is the same requirement as the due process clause. *Arbuthnot v. Pierson*, 607 F. App'x 73, 73-74 (2d Cir. 2015) (adequacy of notice "either the Due Process Clause or the Federal Rules is measured by reasonableness."). All that is required is that the notice "fairly apprise" Class Members "of the terms of the proposed settlement and of the options that are open to them[.]" *Wal-Mart*, 396 F.3d at 114.[7]

In accordance with the Preliminary Approval Order, JND, as of March 30, 2021, has mailed 136,726 copies of the approved Postcard Notice to potential Settlement Class members and their nominees. *See* Ex. 1, ¶10. Potential Settlement Class members were identified from listings of shareholders of record provided to JND by Helios's transfer agent, as well as brokerage firms and other financial institutions holding Helios stock in street name for Settlement Class members. *Id*. at ¶¶3-4. The Postcard Notice directed potential Settlement Class members to the Settlement website, www.heliosandmathesonsecuritieslitigation.com, where downloadable versions of the long-form Notice and Claim Form are available. *Id*. at ¶13.

JND also arranged for the Publication Notice to be transmitted over *PR Newswire* on January 7, 2021 and in the *Investor's Business Daily* on January 11, 2021. *Id*. at ¶11. In addition, JND maintains a toll-free telephone number for Settlement Class members to call and obtain

[7] On January 14, 2021, Defendants informed Plaintiffs that notice required by the Class Action Fairness Act of 20015 was accomplished.

information. *Id*. at ¶12. Similar notice dissemination methods have been consistently held to be adequate in the Second Circuit. *See, e.g., In re Banco Bradesco S.A. Sec. Litig.*, 2019 U.S. Dist. LEXIS 202495, at *11-12 (S.D.N.Y. 2019) (notice via postcard, publication notice, and posting on settlement website adequate and reasonable); *In re New Oriental Educ. & Tech. Grp. Sec. Litig.*, Case No.: 1:12-cv-5724-JGK, Dkt. Nos. 80, 100 (S.D.N.Y. Mar. 10, 2014 & Nov. 25, 2014, respectively) (Koeltl, J.) (same)*; Advanced Battery*, 298 F.R.D. 171, 182-83 (same).

The Notice provided all of the necessary information for Settlement Class members to make an informed decision regarding the Settlement, Lead Counsel's fee and expense application, and the Plan of Allocation. The Notice informed Settlement Class members of, among other things: (i) a description of the nature of the Action and claims asserted; (ii) the definition of the Settlement Class; (iii) the amount of the Settlement; (iv) the reasons for and the material terms of the Settlement; (v) the Plan of Allocation; (vi) the maximum amount of attorneys' fees and expenses that will be sought, including the maximum incentive awards sought by plaintiffs in connection with their representation of the Class; (vii) the time and manner for requesting an exclusion from the Settlement Class or objecting to the Settlement, Plan of Allocation, or the requested attorneys' fees, expenses, or incentive awards, and rights of Settlement Class members to do so; (viii) the date, time, and place of the Settlement Hearing; (ix) the identity and contact information of the representatives of Lead Counsel and procedures for making inquiries; and (x) the binding effect of a judgment on Settlement Class members. *See* ECF 129-1 (Notice); *Signet*, 2020 WL 4196468, at *14, at *42-44 (holding similar notice substance was adequate and accorded with Rule 23(c) and the PSLRA).

This combination of Postcard Notice to those who could be identified with reasonable effort, supplemented by notice in an appropriate publication, transmitted over a newswire, and set

forth on a dedicated internet website, was "the best notice . . . practicable under the circumstances." Fed. R. Civ. P. 23(c)(2)(B).

IV. THE SETTLEMENT CLASS SHOULD BE FINALLY CERTIFIED

The Preliminary Approval Order preliminarily certified the Settlement Class for the purposes of Settlement pursuant to Rules 23(a) and (b)(3). *See* ECF 128 at ¶2. Certification was proper because the class meets the four requirements of Rule 23(a), (numerosity, commonality, typicality, and adequacy of representation), and Rule 23(b)(3). *In re Am. Int'l Group Secs. Litig.*, 689 F.3d 229, 238 (2d Cir. 2012). None of the facts underlying the Court's preliminary class certification have changed in the intervening period, and there have not been any objections to class certification. For the reasons stated in Lead Plaintiff's memorandum of law in support of preliminary approval and the Court's Preliminary Approval Order, Lead Plaintiff respectfully requests that the Court affirm its determinations in the Preliminary Approval Order certifying the Settlement Class under Rules 23(a) and (b)(3) for settlement purposes.

CONCLUSION

For the foregoing reasons, Lead Plaintiff respectfully requests the Court grant final approval of the Settlement and Plan of Allocation and finally certify the Settlement Class for the purposes of the Settlement.

DATED: April 1, 2021

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I, Shannon L. Hopkins, counsel for Lead Plaintiff, the Helios and Matheson Investor Group hereby certify on the this 1st day of April, 2021, that according to the word count feature of the word processing program used to prepare this brief, this brief contains 6,549 words (exclusive of the cover page, certificate of compliance, certificate of service, table of contents, table of authorities, and signature blocks) and complies with Local Civil Rule 11.1 of the Southern District of New York, as well as with the Individual Practice Rule 2.D of the Honorable John G. Koeltl.

/s/ Shannon L. Hopkins
Shannon L. Hopkins

CERTIFICATE OF SERVICE

I, Shannon L. Hopkins, hereby certify that this document was filed through the CM/ECF system and will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) on this 1st day of April, 2021.

/s/ *Shannon L. Hopkins*
Shannon L. Hopkins