UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE FACEBOOK, INC. IPO SECURITIES AND DERIVATIVE LITIGATION

MDL No. 12-2389 (RWS)

This document relates to the Consolidated Securities Action:

No. 12-cv-4081
No. 12-cv-4099
No. 12-cv-4131
No. 12-cv-4150
No. 12-cv-4157
No. 12-cv-4184
No. 12-cv-4194
No. 12-cv-4215
No. 12-cv-4252
No. 12-cv-4291
No. 12-cv-4312
No. 12-cv-4332
No. 12-cv-4360
No. 12-cv-4362
No. 12-cv-4551
No. 12-cv-4648
No. 12-cv-4763
No. 12-cv-4777
No. 12-cv-5511
No. 12-cv-7542
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No. 12-cv-7548
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No. 12-cv-7551
No. 12-cv-7552
No. 12-cv-7586
No. 12-cv-7587

MEMORANDUM OF LAW IN SUPPORT OF LEAD PLAINTIFFS' UNOPPOSED MOTION FOR PRELIMINARY APPROVAL OF SETTLEMENT AND APPROVAL OF NOTICE TO THE CLASS

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Lead Plaintiffs Arkansas Teacher Retirement System ("Arkansas Teacher") and Fresno County Employees' Retirement Association ("Fresno," collectively with Arkansas Teacher, "Lead Plaintiffs"), on behalf of themselves and the other members of the certified Class,[1] respectfully submit this memorandum of law in support of their unopposed motion for preliminary approval of the proposed settlement reached in the above-captioned litigation (the "Settlement"). The Settlement provides a recovery of $35,000,000.00 in cash in order to resolve this securities class action brought against defendants Facebook, Inc. ("Facebook" or the "Company"); Mark Zuckerberg, Sheryl K. Sandberg, David A. Ebersman, David M. Spillane, Marc L. Andreessen, Erskine B. Bowles, James W. Breyer, Donald E. Graham, Reed Hastings, and Peter A. Thiel (collectively, the "Individual Defendants"); and the Underwriter Defendants (which, collectively with Facebook and the Individual Defendants, are hereafter the "Defendants," and, together with Lead Plaintiffs, the "Parties"). The terms of the Settlement are set forth in the Stipulation, dated February 26, 2018, entered into by all Parties.

The Settlement will bring to a close almost six years of hard-fought litigation, which included significant motion practice, certification of a litigation class, the completion of fact and expert discovery, trial preparation, and robust arm's-length negotiations between counsel facilitated by well-respected and experienced mediators, most recently former Judge Daniel Weinstein and Jed Melnick. By this motion, Lead 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) setting a hearing date for final approval of the Settlement (the "Settlement Hearing") and a schedule for various events

[1] All capitalized terms used herein that are not defined have the same meanings given to them in the Stipulation and Agreement of Settlement, dated February 26, 2018 (the "Stipulation"). The Stipulation is annexed as Exhibit 1 to the Declaration of Thomas A. Dubbs, dated February 26, 2018 ("Dubbs Decl.").

relevant thereto (the "Preliminary Approval Order"). As shown below, the Settlement is fair, reasonable, and adequate under the governing standards in this Circuit, and warrants this Court's preliminary approval.

PRELIMINARY STATEMENT

Facebook is a worldwide online social networking company. On May 17, 2012, Facebook conducted one of the most anticipated public offerings in history, selling more than 421 million shares of common stock at $38 per share, raising $16 billion from investors. The Consolidated Class Action Complaint ("Complaint"), filed on February 28, 2013, asserts claims under Sections 11, 12(a)(2), and 15 of the Securities Act of 1933. The Complaint alleges, among other things, that Facebook did not disclose that prior to the May 17, 2012 initial public offering ("IPO"), Facebook learned that a trend of increasing mobile usage had negatively impacted Facebook's advertising business, and that, as a result, the Company cut its revenue estimates for the second quarter of 2012 (the quarter in which Facebook was going public) and the full year 2012. The Complaint further alleges that, rather than disclosing these facts, on May 9, 2012, Facebook filed an amended Registration Statement in which it represented that mobile usage "may" impact the Company's revenues even though the trend allegedly had already had a negative impact on the Company's revenues. The Complaint further alleges that the price of Facebook's Class A Common Stock ("Facebook Common Stock") declined following news reports published after the close of trading on May 18, 2012 and before the opening of trading on May 22, 2012.

The Settlement was reached following almost six years of vigorous litigation, which included, among other things, the Lead Plaintiffs' and Lead Counsel's: (i) extensive investigation into the claims of the Class; (ii) filing of the detailed Complaint; (iii) briefing on Defendants' motions to dismiss; (iv) successful certification of the Class over Defendants' opposition, and

notice of the pendency of the Action and of Class Members' right to seek exclusion; (v) completion of class, fact, and expert discovery, which included more than 50 depositions and the production of more than 1.5 million pages of documents; (vi) collateral litigation in connection with the settlement of the Consolidated NASDAQ Actions pending before the Court to protect the interests of the Class; (vii) opposing Defendants' four motions for summary judgment; (viii) extensive *Daubert* motion practice challenging Lead Plaintiffs' and Defendants' proffered expert testimony; and (ix) comprehensive preparation for trial, including Lead Plaintiffs' motion to bifurcate the trial. Trial was scheduled to start on February 26, 2018.

The Settlement is the result of arm's-length settlement negotiations with the assistance of experienced mediators, at a point when the Parties fully understood the strengths and weaknesses of their respective positions. In December 2017, the Parties reached the agreement in principle to settle when they accepted the mediator's recommendation. Lead Plaintiffs and Lead Counsel believe that the Settlement represents a favorable result and is in the best interests of the Class, particularly when compared to the risks that continued litigation, including summary judgment, trial and likely appeals, might result in a smaller recovery, or no recovery at all.

At the Settlement Hearing, the Court will have before it more detailed motion papers in support of the Settlement and will be asked to make a determination as to whether the Settlement is fair, reasonable, and adequate according to the factors considered by Courts in the Second Circuit.[2] At present, Lead Plaintiffs request that the Court grant preliminary approval of the

[2] *See City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 463 (2d Cir. 1974), *abrogated on other grounds by, Goldberger v. Integrated Res., Inc.*, 209 F.3d 43 (2d Cir. 2000) (establishing nine factors to be considered in reviewing class action settlements: "(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

Settlement so that notice may be provided to the Class. Specifically, Lead Plaintiffs request that this Court enter the Preliminary Approval Order (filed herewith and attached as Exhibit A to the Stipulation), which will, among other things:

- Preliminarily approve the Settlement on the terms set forth in the Stipulation;
- Approve the form and content of the Settlement Notice, Claim Form, and Summary Settlement Notice, attached as Exhibits A-1, A-2 and A-3 to the Stipulation, respectively;
- Find that the procedures established for distribution of the Settlement Notice and Claim Form and publication of the Summary Settlement Notice in the manner and form set forth in the Preliminary Approval Order constitute the best notice practicable under the circumstances, and satisfy the requirements of Rule 23 of the Federal Rules of Civil Procedure, due process, the Private Securities Litigation Reform Act of 1995 ("PSLRA"), 15 U.S.C. § 77z-1, and all other applicable law and rules; and
- Schedule the Settlement Hearing and set deadlines and procedures for: (a) disseminating the Settlement Notice and Claim Form and publishing the Summary Settlement Notice; (b) objecting to the Settlement, the proposed Plan of Allocation, and/or Lead Counsel's application for attorneys' fees and expenses; and (c) submitting papers in support of final approval of the Settlement and the request for attorneys' fees and expenses.

Lead Plaintiffs respectfully request that the Court take the initial step in the approval process and grant preliminary approval of the proposed Settlement. *See In re NASDAQ Mkt.-Makers Antitrust Litig.*, 176 F.R.D. 99, 102 (S.D.N.Y. 1997) ("Preliminary approval of a proposed settlement is the first in a two-step process required before a class action may be settled.") (citation omitted).

BACKGROUND OF THE LITIGATION

Beginning in May 2012, numerous putative securities class actions were filed against Defendants in various state and federal courts alleging violations of the federal securities laws.

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the settlement fund in light of the best possible recovery; [and] (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.")

Following a hearing before the United States Judicial Panel on Multidistrict Litigation, pursuant to 28 U.S.C. § 1407, on October 4, 2012, the actions were transferred to the Court for pre-trial proceedings.

On December 6, 2012, the Court entered an Order consolidating the putative class actions and appointing Arkansas Teacher, Fresno, the North Carolina Department of State Treasurer on behalf of the North Carolina Retirement Systems ("North Carolina DST"), and Banyan Capital Master Fund Ltd. ("Banyan"), as lead plaintiffs for the Action pursuant to the Private Securities Litigation Reform Act of 1995. In the same Order, the Court approved the selection of Bernstein Litowitz Berger & Grossmann LLP and Labaton Sucharow LLP as Lead Counsel for the proposed class. ECF No. 52.

The operative complaint in the Action is the Complaint filed on February 28, 2013. ECF No. 71. The Complaint alleges violations of Sections 11, 12(a)(2), and 15 of the Securities Act, on behalf of a class of all persons and entities who purchased or otherwise acquired Facebook Common Stock in or traceable to the Company's May 17, 2012 IPO during the Class Period, and were damaged thereby.

On April 30, 2013, Defendants moved to dismiss the Complaint. ECF No. 89. On December 12, 2013, the Court issued an Opinion and Order denying Defendants' motion to dismiss. ECF No. 172. On January 10, 2014, Defendants moved to amend and certify the December 12, 2013 Order for interlocutory appeal, which motion the Court denied on March 13, 2014. ECF Nos. 180, 213. On May 9, 2014, Defendants answered the Complaint. ECF Nos. 232, 235.

On December 23, 2014, Arkansas Teacher, Fresno, North Carolina DST, Jose G. Galvan, Mary Jane Lule Galvan, Eric Rand, Paul Melton, Lynn Melton, and Sharon Morley filed a

motion for class certification. ECF No. 255. In connection with the class certification motion, the Parties conducted 16 depositions, including five depositions taken by Lead Counsel and 11 taken by Defendants' Counsel. Plaintiffs submitted an expert report and Defendants submitted two expert reports on issues pertaining to class certification. Following briefing on the motion and oral argument held on October 7, 2015, the Court issued an Opinion dated December 11, 2015 that granted the class certification motion, appointed Lead Plaintiffs and North Carolina DST as representatives of the Class, and appointed Bernstein Litowitz and Labaton Sucharow as Class Counsel.[3] ECF No. 385.

In connection with certification of the Class, on June 8, 2016, the Court entered an Order approving notice to be disseminated to potential members of the Class to notify them of, among other things: (i) the Action pending against Defendants; (ii) the Court's certification of the Action to proceed as a class action on behalf of the Class; and (iii) their right to request to be excluded from the Class, the effect of remaining in the Class or requesting exclusion, and the requirements for requesting exclusion. ECF No. 429.

Pursuant to the Court's June 8, 2016 Order, the Class Mailed Notice was mailed to potential Class Members beginning on August 4, 2016. A total of more than one million copies of the Class Mailed Notice were mailed to potential Class Members. In addition, a more detailed Notice of Pendency of Class Action was made available to potential Class Members on a website developed for the Action and a publication notice of the pendency of the class action was published and released over the *PR Newswire* in August 2016. ECF No. 447. The Class Notice

[3] Although Banyan had previously been appointed as one of the lead plaintiffs, Banyan was not put forward as a class representative in the December 23, 2014 motion, and is no longer acting as co-lead plaintiff in the Action. In addition, on November 9, 2016, the parties stipulated that North Carolina DST voluntarily withdrew from the Action as co-lead plaintiff and class representative and relinquished its right to opt out of this Action or bring a related action, while retaining its rights as an absent Class Member. ECF No. 448.

provided Class Members with the opportunity to request exclusion from the Class, explained that right, and set forth procedures for doing so. The Class Notice informed Class Members that if they chose to remain a member of the Class, they would "be bound by all orders, whether favorable or unfavorable, that the Court enters in this case." The deadline for mailing any requests for exclusion from the Class was October 3, 2016, and 148 requests for exclusion from the Class were received in connection with the dissemination of the Class Notice. *See* Stipulation, Appendix 1.

Plaintiffs and Defendants have completed extensive fact and expert discovery in the Action. The Parties conducted 37 depositions (in addition to the 16 conducted in connection with class certification), which included Lead Counsel taking the depositions of 17 fact witness, six Defendants' expert witnesses, and one third-party witness and Defendants' deposition of eight third-party witnesses and Plaintiffs' five expert witnesses. The Parties also exchanged numerous requests for documents, which resulted in the production of more than 1.5 million pages of documents by Defendants and third parties. During both class and fact discovery, Plaintiffs submitted a total of 11 opening and rebuttal expert reports from five different experts and Defendants submitted 14 opening and rebuttal expert reports from seven different experts in total, all of whom were deposed.

On April 13 and 14, 2017, Defendants filed four motions for summary judgment. ECF Nos. 474, 476, 478, 479. Plaintiffs filed their opposition to these motions on June 8, 2017 under seal (ECF No. 510); Defendants filed their replies in support of their motions on July 20, 2017 under seal (ECF Nos. 520, 521); and the Court heard oral argument on the motions on August 9, 2017.

On April 27, 2017, Defendants filed seven *Daubert* motions seeking to exclude expert testimony proffered by Plaintiffs (ECF Nos. 492-499), and Plaintiffs filed an omnibus *Daubert* motion seeking to exclude expert testimony proffered by Defendants (ECF No. 503). Each side filed its opposition to the other side's *Daubert* motions on June 15, 2017 under seal (ECF Nos. 513, 514), and their replies in support of their *Daubert* motions on August 1, 2017 under seal (ECF Nos. 527-529). The Court heard oral argument on these motions on August 16 and 22, 2017.

On September 29, 2017, Plaintiffs moved to bifurcate the trial of this Action. ECF No. 539. Defendants filed their opposition to this motion on October 27, 2017 under seal (ECF No. 554); Plaintiffs filed their reply in support of the motion on November 10, 2017 (ECF No. 555); the Court heard oral argument on the motion on November 16, 2017; and both Plaintiffs and Defendants submitted letters to the Court supplementing their arguments on December 22, 2017 (ECF Nos. 562, 563). The motions for summary judgment, the *Daubert* motions, and the motion to bifurcate were pending when the Parties agreed in principle to the Settlement.

On April 6, 2017, the Court scheduled a trial in the Action to start on October 23, 2017. On September 29, 2017, the Court rescheduled the trial to start on February 26, 2018. In accordance with this schedule, the Parties conducted extensive trial preparation from September through December 2017 before reaching an agreement in principle to settle the Action, which included (i) exchanging the Parties' trial exhibit lists, proposed stipulations of fact and law, and proposed requests for judicial notice; (ii) exchanging Plaintiffs' statement of subject-matter jurisdiction and Defendants' response; (iii) exchanging the Parties' lists of anticipated pretrial motions, objections and counter-designations to deposition designations, and consents and objections to witness lists; (iv) exchanging their identification of trial counsel, estimated length

of trial, and lists of claims and defenses to be tried and previously asserted claims and defenses not to be tried; (v) exchanging counter-counter deposition designations for witnesses not expected to testify in person at trial, and objections to counter deposition designations disclosed for the first time on December 13, 2017; consent/objections to stipulated facts; consent/objections to agreed statements of law, and consent/objections to requests for judicial notice.

During the course of the litigation, the Parties engaged in various efforts to reach a negotiated resolution, including numerous communications among counsel and an unsuccessful mediation session at the end of 2014. In mid-2017, the Parties retained Judge Weinstein and Mr. Melnick to assist them in exploring a potential settlement of the claims against Defendants. Thereafter, counsel for Lead Plaintiffs and representatives of Defendants met with the mediators in an attempt to reach a settlement, however the mediation session did not result in a settlement. The Parties resumed settlement discussions thereafter and continued to participate in arm's-length settlement discussions with the assistance of the mediators. In December 2017, Judge Weinstein issued a mediator's recommendation that the Action be settled for $35 million, to which the Parties agreed, thus reaching an agreement in principle to settle the Action. That agreement was memorialized in a term sheet executed on January 12, 2018.

ARGUMENT

I. PRELIMINARY APPROVAL OF THE SETTLEMENT IS WARRANTED

A. The Standards for Preliminary Approval of a Proposed Class Action Settlement

Once a proposed settlement is reached, "the court must make 'a preliminary evaluation' as to whether the settlement is fair, reasonable and adequate." *In re Currency Conversion Fee Antitrust Litig.*, No. MDL 1409, 2006 U.S. Dist. LEXIS 81440, at *13 (S.D.N.Y. Nov. 8, 2006)

(citation omitted); *NASDAQ*, 176 F.R.D. at 102 ("In considering preliminary approval, courts make a preliminary evaluation of the fairness of the settlement, prior to notice."). *See also In re Warner Chilcott Ltd. Sec. Litig.*, No. 06 Civ. 11515 (WHP), 2008 U.S. Dist. LEXIS 99840, at *4 (S.D.N.Y. Nov. 20, 2008) ("Although a complete analysis of [the *Grinnell*] factors is required for final approval, at the preliminary approval stage, 'the Court need only find that the proposed settlement fits "within the range of possible approval"' to proceed.") (citations omitted); *In re Platinum & Palladium Commodities Litig.*, No. 10 cv 3617, 2014 WL 3500655 at *12 (S.D.N.Y. July 15, 2014) ("At preliminary approval, it is not necessary to exhaustively consider the factors applicable to final approval.").

Where the proposed settlement appears to be the product of serious, informed, non-collusive negotiations, has no obvious deficiencies, and falls within the range of approval, preliminary approval is generally granted. *See NASDAQ*, 176 F.R.D. at 102 (citing MANUAL FOR COMPLEX LITIGATION §30.41 (3d ed. 1995)); *In re Prudential Sec. Inc. Ltd. P'ships Litig.*, 163 F.R.D. 200, 210 (S.D.N.Y. 1995) ("At this stage of the proceeding, the Court need only find that the proposed settlement fits 'within the range of possible approval . . . .'") (citation omitted). "Once preliminary approval is bestowed, the second step of the process ensues; notice is given to the class members of a hearing, at which time class members and the settling parties may be heard with respect to final court approval." *NASDAQ*, 176 F.R.D. at 102.

B. The Settlement is the Result of Good Faith, Arm's-Length Negotiations by Well-Informed and Experienced Counsel

A strong initial presumption of fairness attaches to a proposed settlement if, as here, the settlement is reached by experienced counsel after substantial discovery and arm's-length negotiations with the assistance of a highly respected mediator. *See In re IMAX Sec. Litig.*, 283 F.R.D. 178, 189 (S.D.N.Y. 2012) (finding a "presumption of correctness attache[d]" to a class-

action settlement where parties were represented by experienced counsel who conducted "substantial merits-related discovery" and mediated before a retired judge); *see also In re Bear Stearns Cos. Sec. Derivative and ERISA Litig.*, 909 F. Supp. 2d 259, 267 (S.D.N.Y. 2012) (same).

Here, the Settlement was negotiated at arm's-length by counsel who are experienced in complex securities litigation and who were acting in a well-informed manner. During the course of the litigation, the Parties participated in various efforts to discuss a resolution. More recently, in mid-2017, a mediation was held, however, the Parties were not able to agree to settle the Action at that time. The Parties continued to participate in arm's-length discussions with the assistance of Judge Weinstein and Mr. Melnick. An agreement in principle to settle the Action was ultimately as the result of a mediator's recommendation in December 2017. "[T]hat the Settlement was reached after exhaustive arm's-length negotiations, with the assistance of a private mediator experienced in complex litigation, is further proof that it is fair and reasonable." *In re Indep. Energy Holdings PLC Sec. Litig.*, No. 00 Civ. 6689 (SAS), 2003 WL 22244676, at *4 (S.D.N.Y. Sept. 29, 2003).

Moreover, the Action was hotly contested and prosecuted for almost six years. The Parties, as discussed above, engaged in: (i) extensive class, fact, and expert discovery, which included more than 50 depositions, the production and review of more than 1.5 million pages of documents, and the exchange of 25 expert reports; and (ii) extensive motion practice, including briefing on Defendants' motions to dismiss the Complaint, Lead Plaintiffs' motion for class certification, discovery motions, Defendants' motions for summary judgment, the Parties' *Daubert* motions, and Lead Plaintiffs' motion to bifurcate the trial. Additionally, given that trial

was approximately two months away when the Parties agreed to settle, counsel had begun the extensive process of trial preparation.

Accordingly, Lead Counsel are particularly well-informed as to the operative facts and potential risks of continuing to pursue the claims compared to the prompt and certain benefits of resolving the Action on the terms reflected in the Stipulation. Under these circumstances, a presumption of fairness attaches to the Settlement. *See Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 116 (2d Cir. 2005) ("A 'presumption of fairness, adequacy, and reasonableness may attach to a class settlement reached in arm's-length negotiations between experienced, capable counsel after meaningful discovery.'") (quoting MANUAL FOR COMPLEX LITIGATION, *supra*, at §30.42).

Moreover, the Settlement was negotiated under the direction of Lead Plaintiffs, which are sophisticated institutional investors. *See In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 462 (S.D.N.Y. 2004) (participation of sophisticated institutional investor lead plaintiffs in settlement process supports approval of settlement).

In sum, the Parties did not achieve a Settlement until they were well-versed in the factual and legal particularities of the case and fully able to evaluate its merits and agree on a settlement figure that was both acceptable to Defendants and fair, reasonable, and adequate to the Class.

C. The Settlement Falls within the Range of Reasonableness and Merits Issuance of Notice and a Hearing on Final Approval

The proposed Settlement is well within the range of reasonableness, given the numerous and substantial risks faced in this litigation. Securities class actions like this one are by their nature complicated, and district courts in this Circuit have long recognized that "[a]s a general rule, securities class actions are 'notably difficult and notoriously uncertain' to litigate." *In re Facebook Inc. IPO Sec. Litig. and Derivative Litig.*, No. MDL 12-2389, 2015 WL 6971424, at

*3 (S.D.N.Y. Nov. 9, 2015), *aff'd*, 674 F. App'x 37 (2d Cir. 2016); (citation omitted) *In re Bear Stearns Cos., Inc. Sec., Derivative & ERISA Litig.*, 909 F. Supp. 2d at 266. This case is no exception.

The Class's claims here raise numerous substantial factual and legal issues concerning, among other things, whether Lead Plaintiffs could establish the falsity and materiality of the alleged false statements and omissions, whether there was "truth on the market" as to the alleged misstatements, and whether the alleged misstatements caused any damages. For example, Defendants had contended in their motions for summary judgment and elsewhere that the Offering Materials for Facebook's IPO did not contain any actionable false statements or omissions about Facebook's 2012 revenue because (i) the Offering Materials repeatedly disclosed the possible risks of increasing mobile usage on Facebook's revenue; (ii) Facebook's statement that increased mobile usage "may" harm future revenue did not imply that the trend was not already affecting revenues; (iii) Plaintiffs could not prove that mobile usage had had any material impact on Facebook's revenues at the time the statements were made; and (iv) Facebook had no obligation to update its disclosures based on interim results unless they showed an extreme departure from the results for the last reported quarter. Defendants also argued that any alleged misstatements or omissions, including Facebook's updated revenue estimates, were not material.

Defendants also had strong arguments that members of the Institutional Investor Subclass, who purchased approximately 74% of the shares issued in the IPO, had knowledge of Facebook's revised revenue estimates prior to the IPO and thus could not have been harmed by the alleged misstatements. The Underwriter Defendants also had separate due diligence defenses. Finally, Defendants had contended and would continue to argue that the disclosure of alleged

misstatements or omissions did not cause the Class Members' damages, asserting that (i) many Class Members were already aware of the allegedly undisclosed information; (ii) the news articles that Plaintiffs alleged disclosed the misstatements only repeated previously published information; and (iii) that other factors, including NASDAQ's technical difficulties following the IPO, were the actual cause of the declines in the price of Facebook common stock after the IPO.

Although Lead Plaintiffs believe that the claims would have been able to survive summary judgment and that they would have been able to support the claims with evidence, jury determinations are inherently difficult to predict. Defendants would have presented counter-evidence, including expert testimony as well as different interpretations of the evidence offered by Lead Plaintiffs, to support their various defenses to liability. A finding in favor of the Class by the jury was far from assured. Accordingly, in the absence of a settlement, there was a real risk that the Class could have recovered an amount significantly less than the total Settlement Amount even if liability were established– or even nothing at all. Thus, the substantial payment of $35,000,000.00, when viewed in the context of the risks and the uncertainties involved in this Action, weighs in favor of approving the Settlement.

As further indicia of its reasonableness, the Settlement has none of the "obvious deficiencies" that could justify denying preliminary approval. *NASDAQ*, 176 F.R.D. at 102. In all respects, the terms embodied in the Stipulation are customary in nature. For instance, the Settlement is not "claims-made" and there is no reversion to Defendants. *See* Stipulation ¶ 13. The Class Representatives' recoveries from the Settlement Fund will be determined according to precisely the same plan of allocation that will determine the recoveries of other Members of the Class, with the exception of any compensatory payment to the Class Representatives approved by the Court, as contemplated by the PSLRA, 15 U.S.C. §77z-1(a)(4). *See NASDAQ*, 176 F.R.D.

at 102 (settlement may be approved preliminarily where it "does not improperly grant preferential treatment to class representatives or segments of the class"); *Prudential*, 163 F.R.D. at 209 (preliminary approval is appropriate where "preliminary evaluation of the proposed settlement does not disclose grounds to doubt its fairness or other obvious deficiencies, such as unduly preferential treatment of class representatives . . ." (citation omitted)).

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

Lead 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. The content of a 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.*, No. 99 Civ. 0962 (RCC), 2006 WL 3498590 at *6 (S.D.N.Y. Dec. 4, 2006) (citation omitted).

The proposed "long form" Settlement Notice is the second notice that potential Class Members will have received concerning the Action. *See generally* ECF No. 447. It 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 since the issuance of the Class Notice; and the claims that will be released. The Settlement Notice also: advises that a Class Member may enter an appearance through counsel if desired; describes the binding effect of a judgment on Class Members under Rule 23(c)(3); reports the proposed Plan of Allocation for the proceeds of the Settlement; states the procedures and deadline for objecting to the proposed Settlement, the proposed Plan of Allocation, 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.

In light of the extensive notice program undertaken in connection with class certification and the ample opportunity provided to Class Members to request exclusion from the Class at that time, the Settlement Notice does not provide a second opportunity for Class Members to request exclusion. *See, e.g., Denney v. Deutsche Bank AG*, 443 F.3d 253, 271 (2d Cir. 2006) (holding that the Court is "under no obligation" to grant a second opt-out period pursuant to Rule 23(e)(4) and that decision is "confided to the [district] court's discretion"); *Visa*, 396 F.3d at 114-15. As mentioned above, pursuant to the Court's June 8, 2016 Order, the Class Notice provided Class Members with the opportunity to request exclusion, explained that right, and set forth deadline and procedures for doing so. 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." The deadline for requesting exclusion from the Class was October 3, 2016. More than one million copies of the Mailed Class Notice were sent to potential Class Members and 148 requests for exclusion from the Class were received in response to the Class Notice. *See* Stipulation, Appendix 1.

Moreover, there is no reason to provide a second opt-out period here because the statute of repose for the Securities Act claims asserted in this Action elapsed in May 2015 and was not tolled by the pendency of this class action. *See* 15 U.S.C. § 77m; *Cal. Pub. Emps' Ret. Sys. v. ANZ Sec., Inc.*, 137 S. Ct. 2042, 2055 (2017). Accordingly, no Class Members who had not previously brought an individual claim would now be able to assert such a claim, and thus could obtain no benefit from a second opt-out opportunity.

The Settlement Notice 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 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 Settlement 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)(A)-(F).

With respect to the application for attorneys' fees and expenses, the case has been prosecuted on a contingency basis since 2012 and Lead Counsel have not received any payment of fees or expenses. Lead Counsel will apply to the Court for an award of attorneys' fees for all Plaintiffs' Counsel, including certain other firms that performed work in this Action at the direction and under the supervision of Lead Counsel (such as Lieff Cabraser Heimann & Bernstein, LLP, Hach Rose Schirripa & Cheverie, LLP, Baron & Budd, P.C., and Motley Rice LLC), in an amount not to exceed 25% 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 $5.6 million, which amount may include an application for the reasonable costs and expenses incurred by Class Representatives directly related to their representation of the Class.

Lead Plaintiffs, through the Claims Administrator, will cause the Settlement Notice to be mailed by first class mail to every Class Member who can be identified through reasonable

effort, including through using the mailing list for the Class Notice. The Summary Settlement Notice, attached as Exhibit 3 to the Preliminary Approval Order, will be published in *Investor's Business Daily* and transmitted over *PR Newswire* and *CNW Newswire*.

Lead Plaintiffs also request that the Court appoint A.B. Data, Ltd. ("A.B. Data") as the Claims Administrator to provide all notices approved by the Court to Class Members, to process Claim Forms, and to administer the Settlement. A.B. Data was appointed by the Court to disseminate the Class Notice and they are a leader in legal administration services for class action settlements and legal noticing programs in the country. *See* Dubbs Decl. Ex. 2.

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) 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 here readily meets these standards, and is typical of notice plans in similar actions. For all the foregoing reasons, the notice program should be approved by the Court.

III. PROPOSED SCHEDULE OF SETTLEMENT EVENTS

If the Court grants preliminary approval of the Settlement, the Parties respectfully submit the following general schedule for the Court's consideration.

Event	Time for Compliance
Deadline for mailing the Settlement Notice and Claim Form to potential Class Members	20 business days after entry of the Preliminary Approval Order ("Notice Date")
Deadline for publishing the Summary Settlement Notice in *Investor's Business Daily* and over *PR Newswire* and *CNW Newswire*	10 business days from the Notice Date
Deadline for filing motions in support of approval of the Settlement, Plan of Allocation, and in support of Lead Counsel's	35 calendar days prior to the Settlement Hearing

Event	Time for Compliance
application for an award of attorneys' fees and expenses	
Deadline for submitting objections	21 calendar days prior to the Settlement Hearing
Deadline for filing of reply papers in support of Settlement, Plan of Allocation, and/or Lead Counsel's request for an award of attorneys' fees and expenses	7 calendar days prior to the Settlement Hearing
Settlement Hearing	At the Court's convenience but not earlier than 100 days after the Court enters the Preliminary Approval Order
Deadline for filing a Claim Form	120 calendar days after the Notice Date

If the Court agrees with the proposed schedule, Lead Plaintiffs request that the Court schedule the Settlement Hearing for a date 100 calendar days after entry of the Preliminary Approval Order, or at the Court's earliest convenience thereafter. For example, if the Court enters the Preliminary Approval Order by March 2, 2018, Lead Plaintiffs request that the Court schedule the Settlement Hearing for June 11, 2018, or at the earliest date thereafter on which the Court's schedule will allow the hearing.

CONCLUSION

Based on the foregoing, Lead Plaintiffs respectfully request that the Court enter the proposed Preliminary Approval Order, which will provide: (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: February 26, 2018

Respectfully submitted,

LABATON SUCHAROW LLP

/s/ Thomas A. Dubbs
Thomas A. Dubbs
James W. Johnson
Thomas G. Hoffman, Jr.
140 Broadway
New York, New York 10005
Tel: (212) 907-0700
Fax: (212) 818-0477

Co-Lead Counsel for Lead Plaintiffs, Class Representative Sharon Morley and the Class

Salvatore J. Graziano
John J. Rizio-Hamilton
BERNSTEIN LITOWITZ BERGER & GROSSMANN LLP
1251 Avenue of the Americas
New York, New York 10020
Tel: (212) 554-1400
Fax: (212) 554-1444

Co-Lead Counsel for Lead Plaintiffs and the Class

Steven E. Fineman
Nicholas Diamand
LIEFF CABRASER HEIMANN & BERNSTEIN, LLP

250 Hudson Street, 8th Floor
New York, New York 10013
Tel: (212) 355-9500
Fax: (212) 355-9592

Additional Counsel for Named Plaintiffs and Class Representatives Jose G. Galvan and Mary Jane Lule Galvan

Frank R. Schirripa
HACH ROSE SCHIRRIPA & CHEVERIE LLP
185 Madison Avenue
New York, New York 10016
Tel: (212) 213-8311
Fax: (212) 799-0028

Additional Counsel for Class Representatives Eric Rand, and Paul and Lynn Melton

CERTIFICATE OF SERVICE

I hereby certify that on February 26, 2018, I caused the foregoing Memorandum of Law in Support of Lead Plaintiffs' Unopposed Motion for Preliminary Approval of Settlement and Approval of Notice to the Class to be served electronically on all ECF participants.

/s/ *Thomas A. Dubbs*
Thomas A. Dubbs