UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

RACHNA MEHROTRA, TSE WINSTON WING KUEN, and JAMES LINER, *on behalf of themselves and all other persons similarly situated*,

Plaintiffs,

-against-

BAKKT HOLDINGS, INC. f/k/a VPC IMPACT ACQUISITION HOLDINGS, JOHN MARTIN, OLIBIA STAMATOGLOU, GORDON WATSON, KAI SCHMITZ, and KURT SUMMERS,

Defendants.

DECISION AND ORDER

22-CV-2283 (EK) (PK)

Peggy Kuo, United States Magistrate Judge:

Suzanne Poirier ("Poirier") brought this action against Defendants Bakkt Holdings, Inc., f/k/a VPC Impact Acquisition Holdings, John Martin, Olibia Stamatoglou, Gordon Watson, Kai Schmitz, and Kurt Summers (collectively, "Defendants"), on behalf of herself and a putative class consisting of investors in Bakkt Holdings, Inc. ("Bakkt"), alleging violations of federal securities laws. (*See* Am. Compl., Dkt. 45.)

Co-Lead Plaintiffs Tse Winston Win Kuen, James Liner, and Rachna Mehrotra (collectively, "Plaintiffs") have filed an unopposed Motion for Preliminary Approval of Settlement (the "Motion," Dkt. 54), which was referred to me by the Honorable Eric Komitee. (Order Referring Motion dated April 27, 2023.) For the reasons stated below, the Motion is granted.

BACKGROUND

I. Factual and Procedural Background

Poirier commenced this action on April 21, 2022. (*See* Compl., Dkt. 1.) Pursuant to an unopposed stipulation, Plaintiffs were appointed Co-Lead Plaintiffs, and Levi & Korsinsky, LLP and

Pomerantz LLP were appointed Co-Lead Counsel. (So-Ordered Stipulation and Order Appointing Co-Lead Plaintiffs and Co-Lead Counsel, Dkt. 41.) In ordering the appointment, the Court found that Plaintiffs and Co-Lead Counsel had made a preliminary showing of typicality and adequacy under Federal Rule of Civil Procedure 23. (*Id.*)

Plaintiffs allege that Defendants, a special purpose acquisition company ("SPAC") and certain of its officers, published false or misleading statements or omissions to investors and in United States Securities and Exchange Commission ("SEC") filings. (Am. Compl. ¶¶ 80-165.) Plaintiffs contend that these statements and omissions artificially inflated the price of Bakkt's stock, causing damages to Plaintiffs and to "all persons and entities who purchased or acquired . . . Bakkt's publicly traded securities during the Class Period and/or . . . Bakkt's publicly traded securities pursuant and/or traceable to the Registration Statement." (*Id.* ¶ 64.)

The parties engaged in a full-day mediation session with Robert A. Meyer of JAMS ADR on February 28, 2023. (Joint Letter, Dkt. 50; Declaration of Jeremy A. Lieberman and Adam M. Apton in Support of the Motion ("Co-Lead Counsel Decl.") ¶ 40, Dkt. 54-2.)

On March 9, 2023, the parties informed the Court that they had reached a settlement in principle. (Joint Letter, Dkt. 51.)

In the Motion, Plaintiffs, with Defendants' consent, request (1) preliminary approval of the proposed Settlement Agreement; (2) approval of the proposed notice of settlement and settlement procedure, (3) preliminary certification of a class for settlement purposes only, and (4) a final fairness hearing. (Motion at 1; *see also* Stipulation and Agreement of Settlement ("Settlement Agreement"), Dkt. 53; Plaintiffs' Memorandum of Law in Support of the Motion ("Pls. Mem."), Dkt. 54-1; Co-Lead Counsel Decl.; Declaration of Adam D. Walter of A.B. Data, Ltd. Regarding Notice and Administration ("Claims Administrator Decl."), Dkt. 54-3; Proposed Preliminary Approval Order, Ex. A to the Settlement Agreement; Proposed Final Judgment, Ex. B to the Settlement Agreement.)

II. The Settlement Agreement and Procedure

On or about April 17, 2023 the parties executed a Stipulation and Agreement of Settlement. (*See* Settlement Agreement.) The parties also executed a separate Confidential Supplemental Agreement concerning the criteria for when the Settlement may be withdrawn or terminated based on the exclusion of class members. (*See* Confidential Supplemental Agreement, Dkt. 58.)

The parties stipulate, for settlement purposes only, to the certification of a Fed. R. Civ. P. 23(a) and 23(b)(3) "Settlement Class" comprised of

> all persons and entities who purchased or otherwise acquired publicly traded Bakkt Securities (i) during the period from March 31, 2021 through November 19, 2021, both dates inclusive, or (ii) pursuant and/or traceable to the Registration Statement, and were allegedly damaged thereby.

(Settlement Agreement ¶¶ 1(rr), 2.) The Settlement Class excludes

> (i) Defendants; (ii) current and former officers and directors of Bakkt; (iii) members of the Immediate Family of each of the Individual Defendants; (iv) all subsidiaries and affiliates of Bakkt and the directors and officers of Bakkt and their respective subsidiaries or affiliates; (v) all persons, firms, trusts, corporations, officers, directors, and any other individual or entity in which any Defendant has a controlling interest, provided, however, that any "Investment Vehicle" shall not be excluded from the Settlement Class; (vi) the legal representatives, agents, affiliates, heirs, successors-in-interest or assigns of all such excluded parties; and (vii) any persons or entities who properly exclude themselves by filing a valid and timely request for exclusion.

(Settlement Agreement ¶ 1(rr).)

Under the terms of the Settlement Agreement, in exchange for a cash payment of $3,000,000.00 ("Settlement Amount"), Plaintiffs and the putative settlement class shall release all claims that Plaintiffs or any other member of the Settlement Class

> (i) asserted in any of the complaints filed in the Action; or (ii) could have asserted in the Action or in any other action or in any other forum that arise out of the allegations in any of the complaints filed in the Action, including all claims relating to or arising from purchase or acquisition of Bakkt securities: (a) during the Class Period; and/or (b) pursuant and/or traceable to Bakkt's Registration Statement issued in connection with the [merger between VPC Impact Acquisition Holdings and Bakkt Holdings LLC.]

(Co-Lead Counsel Decl. ¶ 50; Settlement Agreement ¶¶ 1(mm), (qq).) The "Settlement Fund" (the Settlement Amount plus interest earned thereon) will be used to pay taxes, notice and claims administration costs, attorneys' fees and litigation expenses, and any other award made to Plaintiffs by the Court pursuant to the Private Securities Litigation Reform Act of 1995 ("PSLRA"). (Settlement Agreement ¶¶ 1(uu), 13.) The parties have not stipulated to an amount for attorneys' fees and expenses, and Co-Lead Counsel intends to apply for reasonable attorneys' fees and expenses, including an award to Plaintiffs for costs and expenses pursuant to the PSLRA. (Settlement Agreement ¶ 22.) The attorneys' fees shall not exceed one-third of the Settlement Amount, plus interest, and the expenses shall not exceed $80,000.00 plus accrued interest. (Notice of Proposed Settlement ("Notice"), Ex. A-1 to the Preliminary Approval Order ¶ 5, Dkt. 53.) Plaintiffs may also seek an award of no more than $15,000.00 combined for representing the class. (*Id.*)

After these payments are made, the remaining Settlement Fund ("Net Settlement Fund") will be distributed to claimants. (*Id.* ¶ 13.) The Net Settlement Fund will be distributed based on a *pro rata* distribution to claimants, with no portion to be returned to Defendants, as set forth in a "Plan of Allocation" included in the Notice. (*Id.* ¶ 52.) The Plan of Allocation is to be approved by the Court and may be modified by the Court without further notice. (Settlement Agreement ¶ 28; Notice ¶ 2.) Each share of common stock and warrants will be assigned a value based on calculations described in the Plan of Allocation that take into account the purchase date, the amount purchased, and if and when the stocks or warrants were sold. (Notice ¶ 32.)

Only claimants who submit a Claim Form shall receive settlement proceeds. (Notice ¶ 66.) Potential class members may also exclude themselves from the settlement class, preserving their claims against Defendants, or object to the settlement. (*Id.* ¶¶ 68-70.) Potential class members who did not exclude themselves, object, or submit a Claim Form will waive any claims they may have against Defendants and will not participate in the settlement. (*Id.* ¶ 82.)

A.B. Data, Ltd. (the "Claims Administrator") was selected to administer notice of the settlement and the claims process after a bidding process. (Co-Lead Counsel Decl. ¶ 51.) The Claims Administrator will identify potential class members by searching a proprietary database of banks, brokers, and other nominees, and by submitting notice to the Depository Trust Company to post on its Legal Notice System. (Claims Administrator Decl. ¶ 4.) The Claims Administrator will mail a Postcard Notice to all identified potential class members, as well as send notice via email to any email addresses provided in transfer records or the proprietary database. (*See* Postcard Notice, Ex. A-4 to the Settlement Agreement, Dkt. 53; Settlement Agreement ¶ 26; Claims Administrator Decl. ¶ 5.)

In addition to the Postcard Notice, the Claims Administrator will publish a Summary Notice (Ex. A-3 to the Settlement Agreement) once in *Investor's Business Daily* and once over a national newswire service and shall maintain a toll-free phone number and website with information about the settlement at www.BakktSecuritiesSettlement.com ("Settlement Website"). (Claims Administrator Decl. ¶¶ 2, 8; Proposed Order ¶ 12.) A long-form Notice and the Claim Form shall be posted on the Settlement Website. (Claims Administrator Decl. ¶ 8; Proposed Order ¶ 2.)

The Postcard Notice will include a link to the Settlement Website. (Postcard Notice at 1.) The long-form Notice published on the Settlement Website instructs nominees who purchased or acquired Bakkt Securities for beneficial owners to either request additional copies of the Notice and the Claim Form for the purposes of distributing to such beneficial owners who may be class members or provide to the Claims Administrator the contact information of such beneficial owners. (Notice ¶ 83.)

The Claims Administrator will review completed Claim Forms and distribute the Net Settlement Fund to claimants pursuant to the Plan of Allocation. (Claims Administrator Decl. ¶¶ 12, 13.)

DISCUSSION

I. Preliminary Approval of Proposed Settlement Agreement

A. Standard of Review

Class settlements under Rule 23 require court approval. Fed. R. Civ. P. 23(e).

"A class action settlement approval procedure typically occurs in two stages: (1) preliminary approval—where 'prior to notice to the class, a court makes a preliminary evaluation of fairness,' and (2) final approval—where 'notice of a hearing is given to the class members, [and] class members and settling parties are provided the opportunity to be heard on the question of final court approval.'" *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 330 F.R.D. 11, 27 (E.D.N.Y. 2019) (alteration in original) (quoting *In re LIBOR-Based Fin. Instruments Antitrust Litig.*, No. 11-CV-5450, 2016 WL 7625708, at *2 (S.D.N.Y. Dec. 21, 2016)).

Under Federal Rule of Civil Procedure Rule 23(e), in considering a motion for preliminary approval of a proposed settlement, a court must consider whether "giving notice is justified by the parties' showing that the court will likely be able to: (i) approve the proposal under Rule 23(e)(2); and (ii) certify the class for purposes of judgment on the proposal." Fed. R. Civ. P. 23(e)(1)(B)(i-ii). Factors relevant to the Court's decision whether to approve a proposed class action settlement include "(1) adequacy of representation, (2) existence of arm's-length negotiations, (3) adequacy of relief, and (4) equitableness of treatment of class members." *In re GSE Bonds Antitrust Litig.*, 414 F. Supp. 3d 686, 692 (S.D.N.Y. 2019) (citing Fed. R. Civ. P. 23(e)(2)).

Courts look to the nine "*Grinnell* factors to fill in any gaps and complete the analysis." *Cymbalista v. JPMorgan Chase Bank, N.A.*, No. 20-CV-456 (RPK)(LB), 2021 WL 7906584, at *5 (E.D.N.Y. May 25, 2021) (collecting cases), *report and recommendation adopted*, Order dated Nov. 22, 2021. These 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; (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.

City of Detroit v. Grinnell Corp., 495 F.2d 448, 463 (2d Cir. 1974) (citations omitted), *abrogated on other grounds by Goldberger v. Integrated Res., Inc.*, 209 F.3d 43 (2d Cir. 2000); *accord Charron v. Wiener*, 731 F.3d 241, 247 (2d Cir. 2013).

B. Discussion

Considering both the procedural and substantive factors set forth in Fed. R. Civ. P. 23(e)(2), as well as the *Grinnell* factors, I find that the Court will likely be able to approve the parties' proposed settlement agreement as fair, reasonable, and adequate.

i. **<u>Rule 23(e)(2) Factors</u>**

a. Adequate Representation by Class Representatives and Class Counsel – Fed. R. Civ. P. 23(e)(2)(A)

In determining the adequacy of representation by class representatives and class counsel, courts consider "whether (1) plaintiff's interests are antagonistic to the interest[s] of other members of the class and (2) plaintiff's attorneys are qualified, experienced and able to conduct the litigation." *Mikhlin v. Oasmia Pharm. AB*, No. 19-CV-4349 (NGG)(RER), 2021 WL 1259559, at *4 (E.D.N.Y. Jan. 6, 2021) (alteration in original) (quoting *Cordes & Co. Fin. Servs. v. A.G. Edwards & Sons, Inc.*, 502 F.3d 91, 99 (2d Cir. 2007)).[1] "An adequate class representative is one who has 'an interest in vigorously pursuing the claims of the class' and 'no interests antagonistic to the interests of other class members.'" *Id.* (quoting *Denney v. Deutsche Bank AG*, 443 F.3d 253, 268 (2d Cir. 2006)). "Courts find class counsel qualified when they are experienced and 'knowledge[able] in the area of complex class actions.'"

[1] "Because this factor is 'nearly identical to the Rule 23(a)(4) prerequisite of adequate representation in the class certification context,'" the Court's consideration of this factor is guided by Rule 23(a)(4) case law. *Mikhlin*, 2021 WL 1259559, at *4 n.3 (quoting *In re Payment Card*, 330 F.R.D. at 30 n.25).

Cymbalista, 2021 WL 7906584, at *5 (alteration in original) (quoting *In re Payment Card*, 330 F.R.D. at 30 n.25).

Plaintiffs' interests are not antagonistic to those of other class members. All class members, including Plaintiffs, suffered similar harm because of the same alleged acts and omissions by Defendants. Plaintiffs allege that they and "all persons and entities who purchased or acquired . . . Bakkt's publicly traded securities during the Class Period and/or . . . Bakkt's publicly traded securities pursuant and/or traceable to the Registration Statement" were harmed by the alleged false and misleading statements. (Am. Compl. ¶ 64.) There is no reason to doubt the shared interests between Plaintiff and the other class members.

Plaintiff's Co-Lead Counsel have ably litigated this case for over a year, including by investigating the alleged fraudulent misrepresentations, filing the Complaint and Amended Complaint, and engaging in mediation. (Co-Lead Counsel Decl. ¶ 5.)

b. Arm's Length Negotiation – Fed. R. Civ. P. 23(e)(2)(B)

A class settlement "reached through arm's-length negotiations between experienced, capable counsel knowledgeable in complex class litigation … 'enjoy[s] a presumption of fairness.'" *In re GSE Bonds*, 414 F. Supp. 3d at 693 (quoting *In re Austrian & German Bank Holocaust Litig.*, 80 F. Supp. 2d 164, 173-74 (S.D.N.Y. 2000)); *accord Mikhlin*, 2021 WL 1259559, at *5.

The parties reached the settlement after participating in a full-day mediation session with an experienced, professional mediator and after exchanging mediation statements concerning the claims, liability, and damages. (Co-Lead Counsel Decl. ¶¶ 40, 43-44.) The Settlement Agreement states that the parties agree that the settlement was negotiated "at arm's-length and in good faith by the Parties. . . and reflect[s] a Settlement that was reached voluntarily after extensive negotiations and consultation with experienced legal counsel." (Settlement Agreement ¶ 50.)

This factor weighs in favor of preliminary approval.

c. Adequate Relief for the Class – Fed R. Civ. P. 23(e)(2)(C)

In evaluating whether the proposed settlement provides adequate relief for the class, the Court considers: "(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 the timing of payment; and (iv) any agreement required to be identified under Rule 23(e)(3)." Fed. R. Civ. P. 23(e)(2)(C)(i-iii).

i. **<u>Costs, Risks, and Delay of Trial and Appeal – Fed. R. Civ. P. 23(e)(2)(C)(i)</u>**

The first factor set forth under Rule 23(e)(2)(C), "the 'costs, risks, and delay of trial and appeal,' 'subsumes several *Grinnell* factors,' including the complexity, expense and likely duration of litigation, the risks of establishing liability, the risks of establishing damages, and the risks of maintaining the class through trial." *Mikhlin*, 2021 WL 1259559, at *5 (quoting *In re Payment Card*, 330 F.R.D. at 36); *accord Cymbalista*, 2021 WL 7906584, at *6.

Courts favor settlement when it "results in 'substantial and tangible present recovery, without the attendant risk and delay of trial.'" *In re Payment Card*, 330 F.R.D. at 36 (quoting *Sykes v. Harris*, No. 09-CV-8486, 2016 WL 3030156, at *12 (S.D.N.Y. May 24, 2016) (citation omitted)). Class action lawsuits "have a well-deserved reputation as being most complex." *Id.* (quoting *In re Sumitomo Copper Litig.*, 189 F.R.D. 274, 281 (S.D.N.Y. 1999) (citation omitted)); *see also Garland v. Cohen & Krassner*, No. 08-CV-4626 (KAM)(RLM), 2011 WL 6010211, at *7 (E.D.N.Y. Nov. 29, 2011) ("Given the complexity of any class action lawsuit . . . it is reasonable to assume that absent the instant [s]ettlement, continued litigation would have required extensive time and expense.").

"In considering the risks of establishing liability, the court 'need only assess the risks of litigation against the certainty of recovery under the proposed settlement.'" *Mikhlin*, 2021 WL 1259559, at *5 (quoting *In re Glob. Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 459 (S.D.N.Y. 2004)).

"Settlement is favored in cases in which 'plaintiffs would have faced significant legal and factual obstacles to proving their case.'" *Id.* (quoting *In re Glob. Crossing*, 225 F.R.D. at 459).

The parties dispute factual issues central to their claims and defenses, including whether Defendants acted with intent and the alleged falsity and materiality of Defendants' statements. (Co-Lead Counsel Decl. ¶¶ 57-66.)

The parties note that Bakkt is experiencing financial volatility and expects that its workforce will decline in 2023. (*Id.* ¶¶ 58-59.) A settlement avoids the risk of Bakkt being unable to participate in lengthy, complex litigation or being unable to pay any resultant judgment against it.

The parties have stipulated to Rule 23 class certification for settlement purposes only. If this case were to proceed, however, Defendants, who contest Plaintiff's allegations, could oppose class certification. *See In re Payment Card*, 330 F.R.D. at 40 (finding this factor "'weighs in favor of settlement' where 'it is likely that defendants would oppose class certification' if the case were to be litigated" (quoting *Garland*, 2011 WL 6010211, at *8)).

In sum, the "costs, risks and delay of trial and appeal" are significant and weigh in favor of preliminary approval of the proposed settlement. Fed. R. Civ. P. 23(e)(2)(C)(i).

ii. <u>Effectiveness of Proposed Method of Distributing Relief – Fed. R. Civ. P. 23(e)(2)(C)(ii)</u>

A court must consider the effectiveness of the parties' "proposed method of distributing relief to the class, including the method of processing class-member claims." Fed. R. Civ. P. 23(e)(2)(C)(ii). "[U]niform relief to all [class members] … constitutes effective distribution." *Berni v. Barilla G. e R. Fratelli, S.p.A.*, 332 F.R.D. 14, 33 (E.D.N.Y. 2019), *vacated and remanded on other grounds sub nom. Berni v. Barilla S.p.A.*, 964 F.3d 141 (2d Cir. 2020). "A plan for allocating settlement funds 'need not be perfect[,]'" and "need only have a reasonable, rational basis, particularly if recommended by experienced and competent class counsel." *Mikhlin*, 2021 WL 1259559, at *6 (first quoting *In re EVCI*

Career Colleges Holding Corp. Sec. Litig., No. 05-CV-10240 (CM), 2007 WL 2230177, at *11 (S.D.N.Y. July 27, 2007); then quoting *In re WorldCom, Inc. Sec. Litig.*, 388 F. Supp. 2d 319, 344 (S.D.N.Y. 2005)).

As discussed in Section II, *supra*, the Notice contains a Plan of Allocation for calculating the value of each stock or warrant held by a potential class member in order to distribute the funds on a *pro rata* basis. Co-Lead Counsel have selected a claims administrator with significant experience administering securities class action settlements to distribute notice to class members, process claim forms, opt-out statements, and objections, calculate the portion of the Net Settlement Fund allocated to each class member, and distribute settlement checks. (Co-Lead Counsel Decl. ¶ 51; Claims Administrator Decl.)

The proposed Notice, Claim Form, Summary Notice, and Postcard Notice describe the terms of the Settlement Agreement and provide clear explanations of how to make a claim, opt out of the class, or object. (*See, e.g.*, Notice at 4.)

The distribution plan appears fair and equitable. This factor, therefore, weighs in favor of preliminary approval.

iii. Terms of Proposed Award of Attorneys' Fees, Including Timing of Payment – Fed. R. Civ. P. 23(e)(2)(C)(iii)

"When analyzing the proposed settlement agreement for final approval, this Court will review Plaintiffs' application for attorneys' fees, taking into account the interests of the class." *Hart v. BHH, LLC*, 334 F.R.D. 74, 79 (S.D.N.Y. 2020). One method for calculating attorneys' fees, which is the trend in this Circuit, is the "'percentage of the fund' method." *McGreevy v. Life Alert Emergency Response, Inc.*, 258 F. Supp. 3d 380, 384 (S.D.N.Y. 2017). Under this method, the Court considers whether the requested fees are reasonable as compared to the settlement amount. *Id.* at 385. Factors to consider include fees awarded in similar cases, the risks to class counsel, and the lodestar calculation. *Id.* at 384 (citing *Goldberger*, 209 F. 3d. 43).

Co-Lead Counsel will apply for an award of attorneys' fees not to exceed one-third of the $3,000,000.00 Settlement Amount, plus interest and litigation expenses not to exceed $80,000.00. (Notice at 64.)

Co-Lead Counsel has not yet submitted a lodestar calculation. The Court, therefore, withholds judgment on the reasonableness of the requested attorneys' fees until a motion for final settlement approval is filed.

This factor does not weight against preliminary approval.

d. Equitable Treatment of Class Members Relative to Each Other – Fed. R. Civ. P. 23(e)(2)(D)

A court must consider whether the proposed settlement "treats class members equitably relative to each other." Fed. R. Civ. P. 23(e)(2)(D). A court may consider "whether the apportionment of relief among class members takes appropriate account of differences among their claims, and whether the scope of the release may affect class members in different ways that bear on the apportionment of relief." Fed. R. Civ. P. 23 advisory committee's note to 2018 amendment.

As stated *supra*, the method of distribution appears fair and reasonable. The apportionment of relief is based on an assignment of value to each stock or warrant held by a class member, taking into consideration when it was bought or sold, ensuring that each class member's allocation is proportionate to the value of the shares held. This factor weighs in favor of preliminary approval.

ii. Remaining *Grinnell* Factors

The *Grinnell* factors not covered by Rule 23(e)(2)(C)(i) are the reaction of the class to the settlement, the stage of the proceedings and the amount of discovery completed, the ability of the defendants to withstand a greater judgment, the range of the settlement fund in light of the best possible recovery, and the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation. A court's consideration of the stage of the proceedings and the amount of discovery completed "is intended to assure the Court 'that counsel for plaintiffs have

weighed their position based on a full consideration of the possibilities facing them.'" *In re Glob. Crossing*, 225 F.R.D. at 458 (quoting *Klein ex rel. Ira v. PDG Remediation, Inc.*, No. 95-CV-4954 (DAB), 1999 WL 38179, at *2-3 (S.D.N.Y. Jan. 28, 1999)).

The Court cannot consider the class's reaction to the proposed settlement until after notice has been provided to the class. The Court is therefore unable to consider this factor at this stage of the proceedings. *See Mikhlin*, 2021 WL 1259559, at *4 n.2; *Caballero ex rel. Tong v. Senior Health Partners, Inc.*, Nos. 16-CV-0326 (CLP), 18-CV-2380 (CLP), 2018 WL 4210136, at *11 (E.D.N.Y. Sept. 4, 2018).

With regard to the remaining factors, Co-Lead Counsel engaged in "significant effort and investigation" into the claims, including consulting with experts, and the parties exchanged information assessing the claims, liability, and damages in advance of mediation. (Co-Lead Counsel Decl. ¶¶ 38-45.) The parties were thus able to weigh their positions based on extensive investigation and information. There is some risk that Bakkt may not be able to withstand greater judgment in light of the volatility of the cryptocurrency market. Finally, Plaintiffs estimate that the Settlement Amount represents 3.75% of approximately $80,000,000.00 in estimated aggregate damages. (Pls. Mem. at 12.) This percentage is within the average range of settlement amounts for securities fraud class actions. *In re China Sunergy Sec. Litig.*, No. 07 CIV. 7895 (DAB), 2011 WL 1899715 (S.D.N.Y. May 13, 2011) ("settlement amounts in securities fraud class actions where investors sustained losses over the past decade . . . have ranged from 3% to 7% of the class members' estimated losses") (quoting *Louisiana Mun. Police Emps. Ret. Sys. v. Sealed Air Corp.*, No. CIVA 03-CV-4372 (DMC), 2009 WL 4730185 (D.N.J. Dec. 4, 2009)).

iii. <u>Identification of Other Agreements</u>

Federal Rule of Civil Procedure 23(e)(3) requires the parties to identify "any agreement made in connection with the proposal." The parties have entered into a Confidential Supplemental Agreement concerning the criteria for when the Settlement may be withdrawn or terminated based on

the exclusion of class members. (*See* Confidential Supplemental Agreement.) Plaintiffs have stated that the Supplemental Agreement is confidential "in order to avoid incentivizing the formation of a group of opt-outs for the sole purpose of leveraging a larger individual settlement to the detriment of the Settlement Class." (Pls. Mem. at 16.) The limited function of the Confidential Supplemental Agreement does not appear to bear on the fairness of the settlement. *See Christine Asia Co. v. Yun Ma*, No. 115MD02631CMSDA, 2019 WL 5257534 at *15 (S.D.N.Y. Oct. 16, 2019) ("[t]his type of agreement is standard in securities class action settlements and has no negative impact on the fairness of the Settlement.").

* * *

Having weighed the Rule 23(e)(2) and *Grinnell* factors, I find that the Court will likely be able to approve the proposed settlement as fair, reasonable, and adequate.

II. Preliminary Certification of Rule 23 Settlement Class

Plaintiff moves to certify, with Defendants' consent, a class for settlement purposes only comprised of:

> all persons and entities who purchased or otherwise acquired publicly traded Bakkt Securities (i) during the period from March 31, 2021 through November 19, 2021, both dates inclusive, or (ii) pursuant and/or traceable to the Registration Statement, and were allegedly damaged thereby.

(Settlement Agreement ¶ 1(rr).) Excluded from the settlement class are:

> (ii) current and former officers and directors of Bakkt; (iii) members of the Immediate Family of each of the Individual Defendants; (iv) all subsidiaries and affiliates of Bakkt and the directors and officers of Bakkt and their respective subsidiaries or affiliates; (v) all persons, firms, trusts, corporations, officers, directors, and any other individual or entity in which any Defendant has a controlling interest, provided, however, that any "Investment Vehicle" shall not be excluded from the Settlement Class; (vi) the legal representatives, agents, affiliates, heirs, successors-in-interest or assigns of all such excluded parties; and (vii) any persons or entities who properly exclude themselves by filing a valid and timely request for exclusion.

(*Id.*)

Plaintiff has asked for certification of the class; however, "[t]he ultimate decision to certify the class for purposes of settlement cannot be made until the hearing on final approval of the proposed

settlement." Fed. R. Civ. P. 23 advisory committee's note to 2018 Amendment. The Court may, however, grant preliminary approval when it will "likely be able to…certify the class for purposes of judgment on the proposal." *In re Payment Card*, 330 F.R.D. at 50 (quoting Fed. R. Civ. P. 23(e)(1)(B)(ii)).

To qualify for certification, a class must meet the prerequisites set forth in Rule 23 of the Federal Rules of Civil Procedure. A plaintiff seeking certification under Rule 23 has the burden to establish (1) numerosity, (2) commonality, (3) typicality, (4) adequacy of representation, (5) superiority of the class action over other procedures, and (6) predominance. *Mazzei v. Money Store*, 829 F.3d 260, 270 (2d Cir. 2016); *see* Fed. R. Civ. P. 23(a), (b)(3). The Second Circuit has also recognized an implied requirement of ascertainability. *Brecher v. Republic of Arg.*, 806 F.3d 22, 24 (2d Cir. 2015) ("Like our sister Circuits, we have recognized an 'implied requirement of ascertainability' in Rule 23 of the Federal Rules of Civil Procedure" (citation omitted)); *see McBean v. City of N.Y.*, 260 F.R.D. 120, 132-33 (S.D.N.Y. 2009).

The parties have stipulated that, for purposes of settlement, the proposed class meets the requirements of Rule 23. (Settlement Agreement ¶ 3.) However, "[n]otwithstanding the parties' willingness to stipulate to the facts necessary for the certification of the class for settlement purposes, the Court bears an independent responsibility to make a determination that every Rule 23 requirement is met before certifying a class." *Farinella v. Paypal, Inc.*, 611 F. Supp. 2d 250, 260-261 (E.D.N.Y. 2009).

To certify a class, a district court must definitively assess each class certification element and find that each requirement is "established by at least a preponderance of the evidence." *In re U.S. Foodservice Inc. Pricing Litig.*, 729 F.3d 108, 117 (2d Cir. 2013) (quoting *Brown v. Kelly*, 609 F.3d 467, 476 (2d Cir. 2010)).

A. Numerosity

Federal Rule of Civil Procedure 23(a)(1) requires that the class be "so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). "[N]umerosity is presumed at a level of 40 members." *Consol. Rail Corp. v. Town of Hyde Park*, 47 F.3d 473, 483 (2d Cir. 1995).

The parties do not know the exact number of class members, but estimate that because Bakkt's stock was publicly traded, there are thousands of potential class members who invested during the class period, and the numerosity requirement is met. (Pls. Mem. at 22-23.)

B. Commonality

Under Rule 23(a)(2) there must be "questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). The questions must be capable of "class[-]wide resolution—which means the determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Sykes v. Mel S. Harris & Assocs. LLC*, 780 F.3d 70, 80 (2d Cir. 2015) (alteration in original) (quoting *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350, 131 S. Ct. 2541, 180 L. Ed. 2d 374 (2011)).

The proposed class members share common questions of law and fact regarding whether Defendants made misleading statements, Defendants' intent, and the resultant damages sustained by investors. These types of common questions are sufficient to satisfy typicality. *Rodriguez v. CPI Aerostructures, Inc.*, No. 20CV0982 (ENV)(CLP), 2021 WL 9032223, at *8 (E.D.N.Y. Nov. 10, 2021).

C. Typicality

The requirement for typicality is met "when each class member's claim arises from the same course of events, and each class member makes similar legal arguments to prove the defendant's liability." *Robinson v. Metro-N. Commuter R.R. Co.*, 267 F.3d 147, 155 (2d Cir. 2001) *abrogated on other grounds by Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (quoting *Marisol A. v. Giuliani*, 126 F.3d 372, 376 (2d Cir. 1997)) (quotations omitted). "The commonality and typicality requirements often 'tend to

merge into one another, so that similar considerations animate analysis' of both." *Brown*, 609 F.3d at 475 (quoting *Marisol A.*, 126 F.3d at 376). "The crux of both requirements is to ensure that maintenance of a class action is economical and that the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence." *Kaye v. Amicus Mediation & Arb. Grp., Inc.*, 300 F.R.D. 67, 78 (D. Conn. 2014) (quoting *Marisol A.*, 126 F.3d at 376 (alterations and citations omitted)).

Plaintiffs' claims are typical of the class. Their claims, and the claims of each class member, arise from Defendants' alleged misrepresentations resulting in inflated stock prices and financial harms to investors. The claims are so interrelated that the class claims will be fairly and adequately protected by Plaintiff. The typicality requirement is satisfied.

D. Adequacy

In assessing adequacy, "the primary factors are whether the class representatives have any 'interests antagonistic to the interests of other class members' and whether the representatives 'have an interest in vigorously pursuing the claims of the class.'" *In re Patriot Nat'l, Inc. Sec. Litig.*, 828 F. App'x 760, 764 (2d Cir. 2020) (quoting *Denney*, 443 F.3d at 268). ""[A] class representative must be part of the class and possess the same interest and suffer the same injury as the class members." *Amchem Prod., Inc. v. Windsor*, 521 U.S. 591, 625-26, (1997).

As discussed in Section I.B.i.a., *supra*, Plaintiff and Co-Lead Counsel are adequate representatives of the class, and the adequacy requirement is met.

E. Ascertainability

The implied requirement of ascertainability demands "only that a class be defined using objective criteria that establish a membership with definite boundaries." *In re Petrobras Sec.*, 862 F.3d 250, 264 (2d Cir. 2017).

The putative class is easily ascertainable. The class is limited to persons who purchased or otherwise acquired Bakkt Securities during a discrete time period, and potential class members must submit documentation of their transactions and holdings to demonstrate their eligibility. (*See* Claim Form at 6.)

F. Rule 23(b)(3)

Federal Rule of Civil Procedure 23(b)(3) requires that "questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3).

i. Predominance

The predominance requirement "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation" and is achieved "if resolution of some of the legal or factual questions that qualify each class member's case as a genuine controversy can be achieved through generalized proof, and if these particular issues are more substantial than the issues subject only to individualized proof." *Moore v. PaineWebber, Inc.*, 306 F.3d 1247, 1252 (2d Cir. 2002) (quoting *Amchem*, 521 U.S. at 623).

Here, common issues predominate because all members of the settlement class suffered the same alleged harms resulting from the same alleged misrepresentations, which are subject to generalized proof and applicable to the entire class. The class is thus sufficiently cohesive to meet the predominance requirement.

ii. Superiority

Matters pertinent to superiority include:

> (A) the class members' interests in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already begun by or against class members; (C) the desirability or

> undesirability of concentrating the litigation of the claims in the particular forum; and (D) the likely difficulties in managing a class action.

Fed. R. Civ. P. 23(b)(3). In assessing a settlement-only class certification, "a district court need not inquire whether the case, if tried, would present intractable management problems," because there will not be a trial. *Amchem*, 521 U.S. at 620.

There is no indication that other class members, who may be spread across the country, have commenced other litigation or have any interest in controlling a separate action, and class members may lack the resources to bring a separate action. Concentrating the adjudication of the claims in the Eastern District of New York is a logical and efficient use of judicial resources. The superiority requirement is met because a class action is superior to alternative forms of adjudication of these claims.

* * *

For the foregoing reasons, the Court finds that preliminary certification of the settlement class is warranted under Federal Rules of Civil Procedure 23(a) and 23(b)(3) because the Court will likely be able to certify the class after the final approval hearing.

III. Distribution of the Class Notice and Notice Procedure

Once a court has determined that it will likely be able to approve the proposed settlement and certify the class, it "must direct notice in a reasonable manner to all class members who would be bound by the proposal . . . ." Fed. R. Civ. P. 23(e)(1)(B).

The PSLRA specifies that any proposed settlement agreement disseminated to the class must include (1) a statement of plaintiff recovery, (2) a statement of potential outcome of case, (3) a statement of attorneys' fees or costs sought, (4) an identification of lawyers' representatives, (5) the reason for settlement, and (6) any other information as required by the Court. 15 U.S.C.A. § 78u-4(a)(7).

For Rule 23(b)(3) classes, "the court must direct to class members the best notice that is practicable under the circumstances" which includes "individual notice to all members who can be identified through reasonable effort." Fed. R. Civ. P. 23(c)(2)(B). The notice "must clearly and concisely state in plain, easily understood language" the following information:

> (i) the nature of the action; (ii) the definition of the class certified; (iii) the class claims, issues, or defenses; (iv) that a class member may enter an appearance through an attorney if the member so desires; (v) that the court will exclude from the class any member who requests exclusion; (vi) the time and manner for requesting exclusion; and (vii) the binding effect of a class judgment on members under Rule 23(c)(3).
>
> Fed. R. Civ. P. 23(c)(2)(B).

"There are no rigid rules to determine whether a settlement notice to the class satisfies constitutional or Rule 23(e) requirements . . . Notice is 'adequate if it may be understood by the average class member.'" *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 114 (2d Cir. 2005) (citation omitted). At the same time, "[c]ourts in this Circuit have explained that a Rule 23 Notice will satisfy due process when it describes the terms of the settlement generally, informs the class about the allocation of attorneys' fees, and provides specific information regarding the date, time, and place of the final approval hearing." *Mikhlin*, 2021 WL 1259559, at *12 (quoting *In re Payment Card*, 330 F.R.D. at 58).

The proposed Notice includes a statement of plaintiff recovery (Notice ¶ 2), a statement of potential outcome of case (*id.* ¶ 24), a statement of attorneys' fees or costs sought (*id.* ¶ 5), an identification of lawyers' representatives (*id.* ¶ 6), and the reason for settlement (*id.* ¶¶ 21-23), satisfying the requirements of the PSLRA. The Notice also provides a summary of the nature of the action (*id.* ¶¶ 13-19), a description of the settlement class (*id.* ¶ 1) the class claims, issues, or defenses; that a class member may enter an appearance through an attorney if the member so desires (*id.* At ¶ 67); that the court will exclude from the class any member who requests exclusion (*id.* ¶ 68); the time and manner for requesting exclusion (*id.* ¶¶ 70-73); and the binding effect of a class judgment on members (*id.* At

19). The Claim Form contains detailed instructions to assist a potential class member in determining if they are a member of the class and instructions for returning the form. (*See generally* Claim Form.)

Within 15 days of this Order, Defendants will provide Plaintiffs with a list of record holders of Bakkt Securities during the relevant class period, including names, addresses, and email addresses. (Proposed Preliminary Approval Order ¶ 10.) Within 20 days of this Order, Co-Lead Counsel, through the Claims Administrator, will mail the Notice and Claim form to all identified class members and post them on the Settlement Website. (*Id.* ¶ 11.) No more than 10 days after the Notice is mailed, the Claims Administrator will publish the Summary Notice in *Investor's Business Daily* and over a national newswire service. (*Id.* ¶ 12.) Claimants must return the Claim Form, opt out, or register their objections no later than 90 days after the Notice and Claim Form are mailed. (*Id.* ¶ 15.)

Because the Notice, Summary Notice, Postcard Notice, and notice procedure provide reasonable notice to class members and clearly and concisely states in plain, easily understood language the requisite information, the Court approves the proposed Notice and notice procedure.

CONCLUSION

For the reasons stated above, the Motion is granted. Accordingly, it is hereby ORDERED that:

(1) The Settlement Agreement is preliminarily approved;

(2) The class of "all persons and entities who purchased or otherwise acquired publicly traded Bakkt Securities (i) during the period from March 31, 2021 through November 19, 2021, both dates inclusive, or (ii) pursuant and/or traceable to the Registration Statement, and were allegedly damaged thereby" (Settlement Agreement ¶ rr) is preliminarily approved for settlement purposes only;

(3) The following are excluded from the class, pursuant to the Settlement Agreement: "(i) Defendants; (ii) current and former officers and directors of Bakkt; (iii) members of the

Immediate Family of each of the Individual Defendants; (iv) all subsidiaries and affiliates of Bakkt and the directors and officers of Bakkt and their respective subsidiaries or affiliates; (v) all persons, firms, trusts, corporations, officers, directors, and any other individual or entity in which any Defendant has a controlling interest, *provided, however,* that any 'Investment Vehicle' shall not be excluded from the Settlement Class; (vi) the legal representatives, agents, affiliates, heirs, successors-in-interest or assigns of all such excluded parties; and (vii) any persons or entities who properly exclude themselves by filing a valid and timely request for exclusion" (*id.*);

(4) Co-Lead Plaintiffs Rachna Mehrotra, Tse Winston Wing Kuen, and James Liner shall serve as Class Representatives for the Settlement Class;

(5) Co-Lead Counsel Pomerantz LLP and Levi & Korsinsky LLP shall serve as counsel for the Settlement Class;

(6) The proposed Notice, Claim Form, Summary Notice, Postcard Notice, and notice procedure are approved;

(7) A.B. Data, Ltd. is appointed as Claims Administrator;

(8) Bakkt shall provide, or cause to be provided, to Co-Lead Counsel, or the Claims Administrator, within fifteen (15) business days after the Court enters this Order, at no cost to the Settlement Fund, a list, in electronic form, of record holders of Bakkt Securities during the Class Period obtained from Bakkt's present or former transfer agent (consisting of names and addresses, as well as e-mail addresses if available), to the extent that such information is reasonably available. The Parties acknowledge that any information provided, or caused to be provided, by Bakkt pursuant to this paragraph shall be treated as confidential and will be used by Co-Lead Counsel and the Claims Administrator solely

to disseminate notice, to apprise Settlement Class Members of the Settlement, and/or to implement the Settlement.

(9) Co-Lead Counsel, through the Claims Administrator, shall commence mailing the Postcard Notice within twenty (20) calendar days after the Court signs this Order (the "Notice Date") by first-class mail to all Settlement Class Members who can be identified with reasonable effort, and cause the Notice and Claim Form to be posted on the Settlement Website at www.BakktSecuritiesSettlement.com.

(10) Not later than ten (10) calendar days after the Notice Date, the Claims Administrator shall cause the Summary Notice to be published once in *Investor's Business Daily* and once over a national newswire service.

(11) At least seven (7) calendar days prior to the Settlement Fairness Hearing, Co-Lead Counsel shall serve on Defendants' Counsel and file with the Court proof, by affidavit or declaration, of such mailing and publishing.

(12) Co-Lead Counsel, through the Claims Administrator, shall make all reasonable efforts to give notice to nominee owners such as brokers firms and other persons or entities who purchased Bakkt Securities during the Class Period for the benefit of another person or entity. Such brokers and other nominees shall, within ten (10) calendar days after receipt of the Notice, (a) request additional copies of the Notice and the Claim Form from the Claims Administrator to send to such beneficial owners; or (b) send a list of the names, addresses, and email addresses (to the extent available) of such beneficial owners to the Claims Administrator. If a nominee elects to send the Notice to beneficial owners, such nominee is directed to mail the Notice within ten (10) calendar days of receipt of the additional copies of the Notice, and upon such mailing, the nominee shall send a statement

to the Claims Administrator confirming that the mailing was made as directed, and shall retain the list of names and addresses.

(13) In order to be entitled to receive a distribution from the Net Settlement Fund after the Effective Date, each Claimant shall take the following action and be subject to the following conditions:

a. A properly completed and executed Claim Form must be submitted to the Claims Administrator, at the post office box or electronic mailbox indicated in the Notice and Claim Form, postmarked no later than ninety (90) calendar days from the Notice Date.

b. The Claim Form submitted by each Claimant must be properly filled out, signed, and submitted in a timely manner in accordance with the provisions of the preceding subparagraph and the instructions set forth in the Notice and Claim Form.

c. Once the Claims Administrator has considered a timely submitted Claim Form, it shall determine whether such Claim is valid, deficient, or rejected. For each Claim determined to be either deficient or rejected, the Claims Administrator shall send a deficiency letter or rejection letter as appropriate, describing the basis on which the Claim was so determined. Persons or entities that timely submit a Claim Form that is deficient or otherwise rejected shall be afforded a reasonable time (at least twenty (20) calendar days for timely Claim Forms and a lesser reasonable period for untimely Claim Forms, to the extent allowed) to cure such deficiency if it shall appear that such deficiency may be cured.

d. For the filing of and all determinations concerning their Claim Form, each Settlement Class Member shall submit to the jurisdiction of the Court.

(14) Any Settlement Class Member who does not timely submit a valid Claim Form shall be barred from sharing in the distribution of the proceeds of the Net Settlement Fund, but will in all other respects be subject to and bound by the provisions of the Settlement Agreement and the Judgment, if entered. Notwithstanding the foregoing, Co-Lead Counsel shall have the discretion (but not an obligation) to accept late-submitted claims for processing by the Claims Administrator so long as distribution of the Net Settlement Fund to Authorized Claimants is not materially delayed thereby, but will bear no liability for failing to accept such late claims.

(15) Any member of the Settlement Class may enter an appearance in the Action, at their own expense, individually or through counsel of their own choice. If they do not enter an appearance, they will be represented by Co-Lead Counsel.

(16) All Settlement Class Members shall be bound by all determinations and judgments in this Action, whether favorable or unfavorable, unless such persons or entities request to be excluded, or "opt out," from the Settlement Class. A Settlement Class Member wishing to be excluded from the Settlement Class must submit to the Claims Administrator a request for exclusion ("Request for Exclusion"), by first-class mail, or otherwise hand-deliver it, such that it is received no later than twenty-one (21) calendar days prior to the Settlement Fairness Hearing to the address listed in the Notice. A Request for Exclusion must be completed in the manner set forth in the Notice. All Settlement Class Members who submit valid and timely Requests for Exclusion in the manner set forth in this paragraph shall have no rights under the Settlement Agreement, shall not share in the distribution of the Net Settlement Fund, and shall not be bound by the Settlement Agreement or any Judgment. Unless otherwise ordered by the Court, any Settlement Class

Member who does not submit a valid and timely written Request for Exclusion as provided by this paragraph shall be bound by the Settlement Agreement.

(17) The Claims Administrator shall cause to be provided to Defendants' Counsel copies of all Requests for Exclusion as expeditiously as possible, but in no event later than five (5) calendar days of receipt thereof and in any event at least fourteen (14) calendar days before the Settlement Fairness Hearing.

(18) No later than seven (7) calendar days before the Settlement Fairness Hearing, Co-Lead Counsel shall file a list of all persons or entities that have submitted timely Requests for Exclusion with its determinations as to whether any Request for Exclusion was not submitted timely.

(19) Any Settlement Class Member who or which does not request exclusion from the Settlement Class may file a written objection to the Settlement, the Plan of Allocation, and/or Co-Lead Counsel's request for an award of attorneys' fees and expenses, including an award to the Plaintiffs under 15 U.S.C. §78u-4(a)(4), in the manner set forth in the Notice. Such comments or objections must be received or filed, not simply postmarked, at least twenty-one (21) calendar days prior to the Settlement Fairness Hearing. Attendance at the Settlement Fairness Hearing is not necessary but any person or entity wishing to be heard orally in opposition to the Settlement, the Plan of Allocation, or the application for attorneys' fees and expenses or awards to the Plaintiffs is required to indicate in their written objection whether they intend to appear at the Settlement Fairness Hearing.

(20) Any Settlement Class Member who or which does not request exclusion from the Settlement Class may file a written objection to the proposed Settlement, the proposed Plan of Allocation, and/or Co-Lead Counsel's motion for attorneys' fees and Litigation

Expenses and appear and show cause, if they have any cause, why the proposed Settlement, the proposed Plan of Allocation, and/or Co-Lead Counsel's motion for attorneys' fees and Litigation Expenses should not be approved; provided, however, that no Settlement Class Member shall be heard or entitled to contest the approval of the terms and conditions of the proposed Settlement, the proposed Plan of Allocation, and/or the motion for attorneys' fees and Litigation Expenses unless that person or entity has filed a written objection with the Court and served copies of such objection on Co-Lead Counsel and Defendants' Counsel at the addresses set forth below such that they are received no later than twenty-one (21) calendar days prior to the Settlement Fairness Hearing.

(21) Any objections, filings, and other submissions by the objector must be completed in the manner set forth in the Notice. Any members of the Settlement Class who do not make their objection in the manner provided shall be deemed to have waived such objection and shall forever be foreclosed from making any objection to the fairness or adequacy of the Settlement as set forth in the Settlement Agreement, to the Plan of Allocation, or to the award of attorneys' fees and expenses to Co-Lead Counsel, or awards to the Plaintiffs, unless otherwise ordered by the Court. Settlement Class Members do not need to appear at the Settlement Fairness Hearing or take any other action to indicate their approval.

(22) All funds held by the Escrow Agent shall be deemed and considered to be in custodia legis of the Court, and shall remain subject to the jurisdiction of the Court, until such time as such funds shall be distributed pursuant to the Settlement Agreement and/or further order(s) of the Court.

(23) All opening briefs and supporting documents in support of the Settlement, the Plan of Allocation, and any application by Co-Lead Counsel for attorneys' fees and expenses

and awards to the Plaintiffs shall be filed and served no later than thirty-five (35) calendar days before the Settlement Fairness Hearing. Replies to any objections shall be filed and served at least seven (7) calendar days prior to the Settlement Fairness Hearing.

(24) Defendants' Releasees shall have no responsibility for the Plan of Allocation or any application for attorneys' fees or expenses submitted by Co-Lead Counsel. Any order or proceeding relating to the Plan of Allocation or any application for attorneys' fees or expenses, or any appeal from any order relating thereto or reversal or modification thereof, shall not operate to terminate or cancel the Settlement Agreement, or affect or delay the finality of the Judgment approving the Settlement Agreement and the settlement of the Action.

(25) At or after the Settlement Fairness Hearing, the Court shall determine whether the Plan of Allocation proposed by Co-Lead Counsel, and any application for attorneys' fees or payment of expenses shall be approved. Pending final determination of whether the proposed Settlement should be approved, neither the Plaintiffs, nor any Settlement Class Member, directly or indirectly, representatively, or in any other capacity, shall commence or prosecute against any of the Defendants' Releasees any action or proceeding in any court or tribunal asserting any of the Released Plaintiffs' Claims.

(26) A Settlement Fairness Hearing pursuant to Fed. R. Civ. P. 23(e) will be held by telephone on February 27, 2024 at 11:00 a.m. To dial in to the hearing, call toll free (877) 336-1274 and input the Access Code 1453850. Instructions for accessing the Settlement Fairness Hearing will be made publicly available on the Settlement Website in advance of the hearing.

(27) The Court may adjourn the Settlement Fairness Hearing without further individual notice to the members of the Settlement Class, and reserves the right to approve the

Settlement with such modifications as may be agreed upon or consented to by the Parties and without further notice to the Settlement Class where to do so would not impair Settlement Class Members' rights in a manner inconsistent with Rule 23 and due process of law. The Court further reserves the right to enter its Judgment approving the Settlement and dismissing the Amended Complaint, on the merits and with prejudice, regardless of whether it has approved the Plan of Allocation or awarded attorneys' fees and expenses or made awards to the Plaintiffs.

SO ORDERED:

Peggy Kuo

PEGGY KUO
United States Magistrate Judge

Dated: Brooklyn, New York
September 21, 2023