SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION

DAN KOHL, *et al*., Plaintiff, v. LOMA NEGRA COMPANIA INDUSTRIAL ARGENTINA SOCIEDAD ANONIMA, LOMA NEGRA HOLDING GMBH, SERGIO FAIFMAN, MARCO GRADIN, RICARDO FONSECA DE MENDONÇA LIMA, LUIZ AUGUSTO KLECZ, PAULO DINIZ, CARLOS BOERO HUGHES, DIANA MONDINO, SERGIO DANIEL ALONSO, BRADESCO SECURITIES INC., CITIGROUP GLOBAL MARKETS INC., HSBC SECURITIES (USA) INC., ITAU BBA USA SECURITIES, INC., MERRILL LYNCH, PIERCE, FENNER & SMITH INCORPORATED AND MORGAN STANLEY & CO. LLC, Defendants.	Index No. 653114/2018 Part 53 Hon. Andrew Borrok Motion Sequence No. 8 CLASS ACTION

MEMORANDUM OF LAW IN SUPPORT OF (1) PLAINTIFF'S MOTION FOR FINAL APPROVAL OF THE SETTLEMENT AND APPROVAL OF THE PLAN OF ALLOCATION; AND (2) LEAD COUNSEL'S MOTION FOR AN AWARD OF ATTORNEYS' FEES AND EXPENSES AND AWARD TO PLAINTIFF

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Pursuant to Civil Practice Law and Rules ("CPLR") Article 9, named Plaintiff and Court-appointed Class Representative Dan Kohl ("Plaintiff"), on behalf of himself and the certified Class, respectfully submits this memorandum of law in support of: (1) final approval of the proposed $24,600,000 settlement ("Settlement") of this securities class action ("Action"), (2) approval of the Plan of Allocation ("POA"); and (3) approval of Lead Counsel's request for an award of attorneys' fees and reimbursement of litigation expenses and an award to Plaintiff for his service representing the Class.

The terms of the Settlement are set forth in the Stipulation of Settlement ("Stipulation"), which was filed with the Court on October 11, 2023 (NYSCEF No. 244).[1]

PRELIMINARY STATEMENT

After more than four years of hard-fought litigation, Plaintiff and Lead Counsel obtained a $24.6 million, all-cash Settlement for the benefit of the Class. The claims at issue arise under the Securities Act of 1933 ("Securities Act"). Plaintiff alleged that Defendants made materially false, misleading or incomplete statements in the Offering Documents for Loma Negra's November 2017 IPO concerning two issues: (i) bribery and other corruption-related wrongdoing by Loma's parent, Camargo Corrêa S.A. ("Camargo") (now known as Mover Participações S.A.), and Camargo's construction subsidiary, Construções e Comércio Camargo Corrêa S.A. ("CCCC"); and (ii) the Argentine government's cutbacks of funding for public works, from which Loma derived substantial revenues.

Plaintiff respectfully submits that the Settlement represents an excellent result for the Class. The Settlement was only reached after arm's-length negotiations were held under the auspices of a highly experienced mediator, David Murphy, Esq. of Phillips ADR. The $24.6 million all-cash

[1]Capitalized terms not otherwise defined herein have the meanings set forth in the Stipulation.

Settlement represents a decidedly above-average recovery of investor losses for a case of this type based on objective data, in the face of very substantial litigation risks in a complex securities class action, and was reached only after substantial litigation, discovery, and a protracted and arm's-length mediation process.

As discussed below and in the accompanying Hopkins Affirmation,[2] Plaintiff's and Lead Counsel's efforts to diligently pursue this Action include, *inter alia*: (i) conducting a comprehensive factual investigation; (ii) drafting multiple detailed Amended Complaints; (iii) successfully defeating (in substantial part) Defendants' motion to dismiss the "Second Amended Complaint"; (iv) briefing and prevailing on Defendants' subsequent interlocutory appeal of the denial of their motion to dismiss; (v) participating in substantial and contested discovery including discovery-related motion practice; (vi) reviewing over 750,000 pages of documents that Defendants produced, many of which required translation; (vii) briefing and prevailing on Plaintiff's motion for class certification and defeating Defendants' cross-motion for summary judgment; (viii) briefing and prevailing on Defendants' appeal of the granting of class certification and denial of summary judgment; (ix) consulting with experts and Argentine lawyers and investigators; and (x) successfully navigating a protracted and arms'-length mediation process. *See* Hopkins Aff. ¶¶14-57.

Thus, Plaintiff and Lead Counsel had sufficient information to evaluate the strengths and weaknesses of the case. The Settlement satisfies the CPLR and the *Colt* factors that New York courts look to in evaluating class action settlements. The Plan of Allocation, designed by Plaintiff's

[2] *See* Affirmation of Shannon L. Hopkins in Support of: (1) Plaintiff's Motion for Final Approval of the Settlement and Approval of the Plan of Allocation; and (2) Lead Counsel's Motion for an Award of Attorneys' Fees and Expenses and Award to Plaintiff ("Hopkins Affirmation" or "Hopkins Aff.").

damages expert, provides for a *pro rata* distribution of the Net Settlement proceeds to Class Members, in proportion to their recognized losses, that is customary in securities class actions and, thus, should also be approved.

For Lead Counsel's efforts, undertaken on a wholly contingent basis, Lead Counsel respectfully requests an award of attorneys' fee equal to one-third of the Settlement Fund, or $8.2 million. In total, Lead Counsel has spent over 11,073.35 hours on this litigation, with a "lodestar" value of approximately $7,400,360.50 – all on a *fully contingent* fee basis. *Id.* ¶91. The requested one-third fee award is well within the range of percentage-based fees awarded in securities class actions and merited by the other factors customarily considered by New York courts, and represents a negligible 1.108 multiplier to the lodestar value ($7,400,360.50) of Lead Counsel's time.[3] Lead Counsel's request for reimbursement of litigation expenses totaling $240,088.20 should also be granted, as it seeks reimbursement for expenses that are routinely found to be reasonably incurred. Finally, Plaintiffs' request for a relatively modest $10,000 total award for his service to the Class is fully merited and should be approved.

Pursuant to the Court's Order Preliminarily Approving Settlement and Providing for Notice ("Preliminary Approval Order"), dated November 30, 2023 and entered December 4, 2023 (NYSCEF No. 254), and the Decision+Order thereon (NYSCEF No. 253), Notice was mailed beginning December 21, 2023 to over 20,754 potential Class Members or their nominees and a Summary Notice of the Settlement was published over *PR Newswire*. To date ***no*** objections to any aspect of the Settlement or requested attorneys' fees and expenses have been received. *See* accompanying Affirmation of Ann Cavanaugh Regarding Class Notice and Report on Objections

[3] Lead Counsel will forego interest on any fee and expense award so that all interest on the Settlement Fund will go to the Class.

and Requests for Exclusion Received ("Cavanaugh Aff."), ¶¶5-17; Hopkins Aff. ¶9. The Class reaction strongly supports approval of the Settlement and requested fee and expense and service awards. For these reasons, discussed further below, Plaintiff respectfully requests that the Court approve the Settlement and grant the requested fee and expense awards.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff respectfully refers the Court to the accompanying Hopkins Affirmation for a detailed discussion of the history of the Action, the extensive efforts undertaken by Lead Counsel during the Litigation, the risks of continued litigation, and the negotiations under the auspices of an independent mediator that led to the Settlement. Hopkins Aff., ¶¶11-90.

ARGUMENT

I. THE SETTLEMENT IS FAIR, REASONABLE AND ADEQUATE, AND SHOULD BE APPROVED

New York courts strongly favor settlements as a matter of public policy. *See* *IDT Corp. v. Tyco Grp., S.A.R.L.*, 13 NY3d 209, 213 (2009) ("'[s]tipulations of settlement are judicially favored and may not be lightly set aside'").[4] "Strong policy considerations favor" settlements because "[a] negotiated compromise of a dispute avoids potentially costly, time-consuming litigation and preserves scarce judicial resources; courts could not function if every dispute devolved into a lawsuit." *Denburg v. Parker Chapin Flattau & Klimpl*, 82 NY2d 375, 383 (1993); *see also* *Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 116 (2d Cir. 2005) (courts should be "mindful of the 'strong judicial policy in favor of settlements'").

When considering whether to finally approve a class action settlement, New York courts focus their inquiry on "'the fairness of the settlement, its adequacy, its reasonableness, and the best

[4]Unless otherwise noted, all citations are omitted and emphasis is added.

interests of the class members.'" *Hosue v. Calypso St. Barth, Inc.*, No. 160400/2015, 2017 WL 4011213, at *2 (Sup. Ct., N.Y. Cnty. Sept. 12, 2017). Specifically, New York courts consider the following factors: (i) the likelihood that plaintiff will succeed on the merits; (ii) the extent of support from the parties; (iii) the judgment of counsel; (iv) the presence of good faith bargaining; and (v) the complexity and nature of the issues of law and fact. *See* *Fernandez v. Legends Hosp.*, No. 152208/2014, 2015 WL 3932897, at *2 (Sup. Ct., N.Y. Cnty. June 22, 2015). In addition, courts have noted that finding "adequacy" involves "balance[ing] the value of [that] settlement against the present value of the anticipated recovery following a trial on the merits, discounted for the inherent risks of litigation" (Klein v. Roberts Am. Gourmet Food, Inc, 28 AD3d 63, 73 (2d Dept. 2006)); and considering whether the settlement was "reached in arm's-length negotiations between experienced, capable counsel after meaningful discovery." *Fiala v. Metro. Life Ins. Co.*, 899 NYS2d 531, 538 (Sup. Ct., N.Y. Cnty. 2010) (quoting Wal–Mart Stores Inc. v. Visa USA Inc., 396 F.3d 96, 116 (2d Cir.2005)).

These factors, articulated in *In re Colt Indus. S'holder Litig.*, 155 AD2d 154 (1st Dept. 1990) (the "*Colt* factors"), and reaffirmed in *Gordon v. Verizon Comm'cns*, 148 AD3d 146, 156 (1st Dept. 2017), all strongly favor approval of the Settlement.

A. *Colt* Factor One: The Likelihood of Success on the Merits and Related Litigation Risk Strongly Supports Final Approval

When assessing a proposed settlement of a class action, courts first take into consideration Plaintiffs' ultimate "likelihood of success on the merits." *Gordon*, 148 AD3d at 162; *Colt*, 155 AD2d at 160.[5] While Plaintiff continues to believe in the merits of his case, Defendants have

[5] In this regard, Plaintiff notes, as a general matter, that securities actions are notoriously complex and difficult to prove, and this case was certainly no exception as it involved very significant litigation risk. *See, e.g.*, *In re Bayer AG Sec. Litig.*, 2008 WL 5336691, at *5 (S.D.N.Y. Dec. 15, 2008) ("shareholder actions are notoriously complex and difficult to prove"); *In re Viropharma*

continued to vigorously deny any wrongdoing. Moreover, there are a number of practical, factual, and legal obstacles to Plaintiff's ability to prosecute his claims through trial and collection.

For example, Plaintiff alleged that, in the Offering Documents, Loma (i) misleadingly reassured investors that Loma's affiliate, CCCC, had conducted internal investigations with the help of experts and had "not identified evidence of any wrongdoing by CCCC," but failed to disclose that CCCC (and Loma's parent Camargo) had procured the massive Bicentenario water treatment plant project in Argentina, by means of bribery and sham bidding (the "Car Wash Statements"); and (ii) misleadingly touted the "compelling opportunity" created by Argentina's "announced infrastructure investment plans," while failing to disclose that such opportunities would not materialize because the Argentine government's spending on such projects had already slowed (the "Demand Statements"). Hopkins Aff. ¶¶12. The falsity of both categories of misstatements would have been difficult to prove to a jury.

As to the Car Wash Statements, a recurring practical obstacle was that the alleged underlying wrongdoing that Plaintiff needed to prove occurred at an *affiliate* of defendant Loma (Camargo/CCCC), rather than Loma itself. Moreover, all the relevant discovery was located in Argentina and Brazil, which have far greater restrictions on access to discovery and less protections for the preservation of evidence than the U.S. Thus, Plaintiff's ability to obtain the evidence needed to prove his claims was in serious doubt. Further, Plaintiff's case hinged, in part, on the findings in criminal cases in Argentina (none of which involved Loma personnel) that were

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Inc. Secs. Litig., 2016 WL 312108, at *11 (E.D. Pa. Jan. 25, 2016) (same, citing *Alaska Elec. Pension Fund v. Flowserve Corp.*, 572 F.3d 221, 235 (5th Cir. 2009) ("To be successful, a securities class-action plaintiff must thread the eye of a needle made smaller and smaller over the years by judicial decree and congressional action.")).

moving very slowly in the Argentine courts and may well have ended in acquittals,[6] and on whether that Loma was informed by CCCC that its internal investigations had indeed uncovered evidence of wrongdoing by CCCC. Thus, even if CCCC had committed such wrongdoing, but its internal investigation did not reveal it, or if CCCC told Loma there had been no such wrongdoing, Loma may have been found to have reasonably relied on CCCC's representations, in which case arguably its Prospectus representations would not have been false. Additionally, Defendants interpreted the Appellate Division's ruling on Defendants' motion to dismiss appeal to require a "determination" *by a court or similar tribunal*, that CCCC had in fact committed wrongdoing,[7] and because there was only an Argentine investigating court's Judicial Charging Document, rather than a conclusive verdict, regarding the Bicentenario-related bribery allegations at the time of the IPO Prospectus, if Defendants' interpretation were ultimately adopted by the Court or jury, they would likely be found not liable. Hopkins Aff. ¶¶62-63.

Loma argued that further discovery would not help Plaintiff because Loma's witnesses vigorously denied Plaintiff's allegations; Plaintiff had cited no confidential witnesses supporting his claims; and that there were no third parties who would back up Plaintiff's theory. Defendants also argued that there had been no findings of wrongdoing regarding the contract for the Bicentenario plant to date – even though the bribery in question was alleged to have taken place fifteen years ago in 2008. Loma thus argued that its disclosures about CCCC's internal

[6] The fact that the criminal trials involved certain Argentinean government officials (and Brazilian citizens over which Argentina could not obtain jurisdiction) slowed them down even further, and the majority of such proceedings in Argentina did not involve Bicentenario. Thus, any plea agreement may not have resolved the Bicentenario allegations at all; while any trial, if and when it occurred, would very likely be subject to appeals.

[7] *See* *Kohl v. Loma Negra Compania Indus. Arg. S.A.*, 195 AD3d 414, 415 (1st Dept. 2021). Plaintiff interpreted the Appellate Division's use of the term "if it is determined" to mean "if discovery turns out to show" that such wrongdoing did occur.

investigation were based on the information that it had at the time, and that it had adequately cautioned investors that there could be findings of wrongdoing by CCCC in the future.

As to the "Demand Statements," although document discovery from Loma was largely complete when the Settlement was reached, discovery had yet to show when the Argentine government made cuts to planned public works projects, and importantly, when it communicated this to Loma, or how material those cuts were to Loma's cement sales. *Id.*, ¶64. Loma argued that there had been no evidence indicating Argentina had cut projects or frozen payments to contractors at the time of the IPO; that there was no evidence that any projects Loma was involved in were cut or delayed at the time of the IPO; and that since Loma was not a direct government contractor, it was not privy to the status of the government's contractor payments or project plans and therefore could not have reported about them in its SEC filings. *Id.*

Further, at the time of Settlement, Plaintiff had several requests pending for issuance of Letters Rogatory to Argentina, Brazil and Mexico. Assuming this Court granted Plaintiff's motions, it was not clear whether those countries' central authorities would grant Plaintiff's requests for documents and testimony, and whether it would be in a limited form. Regardless, the scope of such foreign discovery would be far more limited than in the U.S., which could have significantly hampered Plaintiff's ability to prove his case. *Id.*, ¶¶49-52, 65.

In addition, Plaintiff faced substantial risk from Defendants' negative-causation defense, which could prevent Plaintiff from obtaining any meaningful damages. Although Plaintiff defeated Defendants' summary judgment motion on the negative causation issue in the early stages of discovery, Defendants would surely raise the issue in a renewed summary judgment after the close of fact and expert discovery and at trial, and the Parties' disputes over negative causation would likely come down to an unpredictable "battle of the experts." *See In re Am. Bank Note*

Holographics, Inc., Secs. Litig., 127 F. Supp. 2d 418, 427 (S.D.N.Y. 2001) ("'In [a] "battle of experts," it is virtually impossible to predict with any certainty which testimony would be credited, and ultimately, which damages would be found to have been caused by actionable, rather than the myriad nonactionable factors such as general market conditions.'"); *In re Giant Interactive Grp., Inc.*, 279 F.R.D. 151, 161-62 (S.D.N.Y. 2011) (approving settlement where the litigation risks included a "credible defense of 'negative causation'").

Even if Defendants failed to establish negative causation, maximum damages could have been dramatically reduced after fact and expert discovery. Specifically, Plaintiff argued there were three corrective disclosure dates with corresponding ADS drops—May 8, 2018 (the date the Argentine Judicial Charging Document was issued), May 14, 2018 (the day after a UBS report allegedly disclosing public works cutbacks), and May 23, 2018 (the date of an Allaria Ledesma research report). But (i) it was unclear to what extent the May 8 publication in Argentina of the Judicial Charging Document reached the U.S. markets, and the stock drop's statistical significance was questionable upon a regression analysis; (ii) Defendants strenuously argued the UBS report supported Loma's reasonable belief that cement demand would increase at the time of the November 2017 IPO, and did not decline until mid-2018; and (iii) the May 23 Allaria Ledesma report largely repeated the UBS report's disclosures about cement demand, while news of an antitrust investigation involving Loma the same day was unrelated to Plaintiff's allegations and, thus, would have to be disaggregated. Accordingly, if Defendants' arguments were later accepted by the Court or by a jury, damages could be minimal, or zero. *See* Hopkins Aff. ¶¶32, 66-68, 89.

In short, had Plaintiff continued to litigate this Action, there was no assurance that he would have succeeded at summary judgment, Defendants' inevitable motions to exclude Plaintiff's expert reports, or at trial, as well as the likely appeals to the First Department of any

order on those motions in Plaintiff's favor. Even if Plaintiff ultimately succeeded in prevailing on both liability and damages, post-trial motions and further appeals would have loomed. Thus, *Colt* factor one thus weighs heavily in favor of Settlement approval.

B. *Colt* Factors Two, Three, and Four: The Judgment of Counsel, Extent of Support from the Parties, and Presence of Good Faith Bargaining, All Support Settlement Approval

Colt factors two through four – the support of the parties, the judgment of counsel, and whether the parties bargained in good faith – also strongly support approval.

First, the Settlement has the support of all Parties, evidenced in the Stipulation filed with the Court on October 11, 2023 (NYSCEF No. 244) and Plaintiff's Affirmation filed herewith. Kohl Aff. ¶¶10-13. Additionally, although the March 20, 2024 deadline for objections has not yet passed, there has been no objection to any aspect of the Settlement to date. A lack of objections is indicative of the class's approval of a proposed settlement. Hopkins Aff. ¶¶9, 60; Cavanaugh Aff. ¶17.[8] *See* *Pressner v. MortgageIT Holdings, Inc.*, No. 602472/2006, 2007 WL 1794935, at *2 (Sup. Ct., NY Cty. May 29, 2007) (approving settlement "since there has been no objection to the propose[d] settlement.").

Second, in reaching the proposed Settlement, Lead Counsel concluded that it was fair, reasonable, and adequate, particularly given the risks, costs, and uncertainties of continued litigation. Hopkins Aff. ¶¶58-74; *supra* §I.A. New York courts give counsel's views regarding settlement considerable weight. *See* *MortgageIT*, 2007 WL 1794935, at *2.

[8] Should any objections be filed after the date of this brief, Plaintiff will address them on reply. Three requests for exclusion were received in response to the Notice of Pendency mailed January 31, 2022, but none have been received to date after the mailing of the current Notice. Cavanaugh Aff. ¶16. Of the three opt-outs, one was by Sergio Faifman (*see* NYSCEF No. 169, at 24), Loma's CEO and a named Defendant, who is not part of the Class.

Third, the Settlement is the product of extensive, good-faith bargaining, overseen by a nationally renowned mediator (Mr. Murphy) highly experienced in mediating complex securities class actions such as this. Hopkins Aff. ¶¶45-48, 73-74, 90. Indeed, the Stipulation and Settlement Amount reflect the culmination of intensive adversarial litigation and mediation, which included submission of mediation statements, a full-day virtual mediation session and extensive subsequent negotiations, and protracted negotiations over payment provisions. *Id.*, ¶¶14-90. Both Plaintiff and Defendants were represented by highly competent and experienced counsel throughout the process. *Id.*, ¶¶84-85. *See* Gordon, 148 AD3d at 157 ("negotiations are presumed to have been conducted at arm's length and in good faith where there is no evidence to the contrary"). Thus, *Colt* factors two through four also support Settlement approval.

C. *Colt* Factor Five: The Complexity and Nature of the Case Further Support Final Approval

Finally, courts look to the complexity and nature of the issues of law and fact (which is closely related to *Colt* factor one, Plaintiff's likelihood of success). *See* *Saska v. Metro. Museum of Art*, 54 NYS3d 566, 222-23 (Sup. Ct., N.Y. Cnty. 2017) (evaluating the first and fifth *Colt* factors together in granting final approval); *City Trading Fund v. Nye*, 72 NYS3d 371, 393 (Sup. Ct., N.Y. Cnty. 2018) (same). Numerous courts recognize that securities class action litigation is inherently complex, and as discussed above this case was certainly no exception. *Guevoura Fund Ltd. v. Sillerman*, 2019 WL 6889901, at *7 (S.D.N.Y. Dec. 18, 2019) ("Securities class actions are notoriously complex"); *In re Hi-Crush Partners L.P. Sec. Litig.*, 2014 WL 7323417, at *15 (S.D.N.Y. Dec. 19, 2014) ("Courts have recognized the 'notorious complexity' of securities class action litigation.").

Here, as noted above (§I.A.) this Action involved complex issues of law and fact that presented considerable risk to Plaintiff's case. The case was made even more complex as it

involved fact discovery, and legal proceedings, in Argentina and Brazil. The case's numerous factual and legal complexities also presented multiple, serious litigation risks for Plaintiff. Hopkins Aff., ¶¶11-68. The Settlement will result in the certainty of a meaningful all-cash recovery, and also avoid further lengthy litigation proceedings and related costs. This factor also strongly supports final approval of the Settlement.

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

The proposed POA was set forth in full in the Notice sent to Class Members. *See* Cavanaugh Aff., Ex. A, Notice at 5-7. The standard for approval of the POA in New York courts is the same as that for a settlement: "'namely, it must be fair and adequate,'" and a proposed "'allocation formula need only have a reasonable, rational basis, particularly if recommended by experienced and competent class counsel.'" *In re WorldCom, Inc. Secs. Litig.*, 388 F. Supp. 2d 319, 344 (S.D.N.Y. 2005); *see also In re Advanced Battery Techs. Secs. Litig.*, 298 F.R.D. 171, 180 (S.D.N.Y. 2014) (same).

Lead Counsel developed the POA in close consultation with their damages expert, using allocation methodologies routinely applied in securities cases of this type. *See* Hopkins Aff., ¶76. Specifically, the POA is (a) based on the decline in value of Loma ADSs that occurred subsequent to the Offering, while also (b) taking into account the statutory damage formula under Section 11(e) of the Securities Act. *Id.*, ¶77. Eligible Class Members will receive a *pro rata* share of the Net Settlement Fund, in proportion to their losses. *Id.*; Cavanaugh Aff. Ex. A at 6-7. The proposed POA will therefore result in a fair and reasonable distribution of the Net Settlement Fund and should be approved. The absence of any objections to POA to date further supports its approval. *Maley v. Del Glob. Techs.*, 186 F. Supp. 2d 358, 367 (S.D.N.Y. 2002).

III. THE COURT SHOULD APPROVE LEAD COUNSEL'S FEE AND EXPENSE APPLICATION

A. Lead Counsel's Fee Request

Courts have long recognized that attorneys who obtain a recovery for a class in the form of a common fund are entitled to an award of fees and expenses from that fund. *See* Boeing Co. v. *Van Gemert*, 444 U.S. 472, 478 (1980); *Fernandez*, 2015 WL 3932897, at *5 (successful attorneys in common fund class action settlements should generally be awarded a percentage of the recovery). When awarding attorneys' fees from a common fund, both state and federal courts in New York favor the "percentage fee award," as it "aligns the interests of class counsel with those of the class." *Hayes v. Harmony Gold Mining Co.*, 509 F. App'x 21, 24 (2d Cir. 2013); *see also* n.9 below (citing New York state court cases).

Lead Counsel respectfully submits that their work fully merits a fee of one-third of the Settlement Amount, or $8,200,000. Not only is such an award consistent with awards in similar cases by New York state and federal courts,[9] but it is also fully justified by each of the relevant "*Fiala* factors" that New York courts consider when evaluating fee requests.

Notably, as discussed below, the reasonableness of the requested fee is also ***strongly*** confirmed by application of a "lodestar crosscheck", which courts across the country often use to assess the reasonability of a fee request. Lead Counsel spent over 11,073 hours on behalf of the Class in this litigation, with a "lodestar" value of approximately $7,400,360.50, over the almost

[9] *See, e.g.*, *Kirkland, et al. v. WideOpenWest, Inc.*, 653248/2018, NYSCEF No. 145, at 1 (Sup. Ct., N.Y. Cty. Feb. 4, 2022) (awarding one-third fee, plus expenses); *In re Netshoes Sec. Litig.*, 157435/2018, NYSCEF No. 141 at 8 (Sup. Ct., N.Y. Cty. Dec. 10, 2020) (Borrok, J.) (same); *Everquote, Inc. Secs. Litig.*, No. 651177/2019, NYSCEF No. 132, at 9 (Sup. Ct., N.Y. Cty. June 11, 2020) (same); *Charles v. Avis Budget Car Rental, LLC*, No. 152627/2016, 2017 WL 6539280, at *4-*5 (Sup. Ct., N.Y. Cnty. Dec. 21, 2017) (same); *Fernandez*, 2015 WL 3932897, at *6-*7 (same); *Lopez v. Dinex Grp., LLC*, No. 155706/2014, 2015 WL 5882842, at *5-*8 (Sup. Ct, N.Y. Cnty. Oct. 6, 2015) (same).

four and-a-half years of hard-fought litigation (plus more than a year attempting to resolve the Settlement payment provisions and documentation). The requested one-third fee here, equating to $8,200,000, represents an extremely modest 1.108 multiple. Given that "positive" multipliers of 2 to 4 times to the lodestar value of a plaintiffs' attorney's time are commonly awarded in contingent class actions that succeed in recovering a common fund, a fee request that equates to a virtually negligible multiplier is fair and reasonable. *See, e.g.*, *Chen-Oster v. Goldman Sachs & Co.*, 2023 WL 7325264, at *5 (S.D.N.Y. Nov. 7, 2023) (awarding one-third fee or $71,665,000, plus expenses, yielding a "multiplier of 1.52, which also demonstrates that the [requested] fee is reasonable") (citing cases); *Pearlstein v. Blackberry Ltd.*, 2022 WL 4554858, at *10 (S.D.N.Y. Sept. 29, 2022) (awarding one-third or $55 million, yielding multiplier of 2.15, plus expenses) (citing cases); *In re Graña y Montero S.A.A. Secs. Litig.*, 2021 WL 4173684, at *18 (E.D.N.Y. Aug. 13, 2021) (3.56 multiplier "is below what has been deemed reasonable for the common fund settlements in securities class action cases in this circuit") (citing cases); *Netshoes*, 157435/2018, NYSCEF No. 135 at 2; 141 at 8 (Borrok, J.) (awarding one-third fee constituting 1.49 multiplier).

B. The *Fiala* Factors Support the Reasonableness of the Requested Fee

The Court in *Fiala v. Metro. Life Ins. Co.*, 899 NYS2d 531, 610 (Sup. Ct., N.Y. Cnty. 2010), set forth a series of factors that New York courts consider when determining whether a requested percentage fee is reasonable: (i) the risks of the litigation; (ii) whether counsel had the benefit of a prior judgment; (iii) the standing at bar of plaintiffs' and defendants' counsel; (iv) the magnitude and complexity of the litigation and responsibility undertaken; (v) the amount recovered; (vi) what would be reasonable for a counsel to charge in comparable circumstances; and, perhaps most importantly, and (vii) the work performed by counsel. An eighth factor, the "lodestar crosscheck", noted above, is also commonly considered in evaluating the amount of work

performed factor, and is also discussed below. All of these factors support approval of the requested fee.

1. *Fiala* Factor One: Litigation Risks

As detailed above (§I.A.) and in the Hopkins Aff. ¶¶11-68, this Action, like many securities class actions, involved very significant litigation risks. In addition to the difficulties often faced by securities class action plaintiffs (*see* §I.A. above), including strong negative causation arguments, Plaintiff also faced the difficulty of gathering and collecting evidence in Argentina and Brazil; the possibility that CCCC's internal investigation had indeed turned up no evidence of corruption-related wrongdoing even if it had occurred, or at least had so told Loma; and presenting credible factual and expert evidence to the jury so as to prevail over Defendants' vehement liability and damages arguments.

Moreover, unlike Defendants' counsel, Lead Counsel litigated this matter on a fully contingent basis, and thus faced the substantial risk that they would have received no compensation (or even payment of its expenses) had Defendants prevailed. Lead Counsel here knows all too well that this risk was very real, as even the most skilled and diligent contingent-fee counsel are often unsuccessful in securities actions after years of litigation. *See*, *e.g.*, *In re Tesla, Inc. Securities Litigation*, No. 18-cv-04865-EMC, ECF No. 676, Transcript at 2132-35 (N.D. Cal. Feb. 3, 2023) (jury verdict for defendant despite plaintiff winning partial summary judgment on falsity and scienter); *In re Oracle Corp. Secs. Litig.*, 2009 WL 1709050 (N.D. Cal. June 19, 2009), *aff'd*, 627 F.3d 376 (9th Cir. 2010) (granting summary judgment for defendants after eight years of litigation wherein plaintiffs' counsel incurred $7 million in expenses, and worked over 100,000 hours with a lodestar value of roughly $40 million); *Hubbard v. BankAtl. Bancorp, Inc.*, 688 F.3d 713, 730 (11th Cir. 2012) (overturning jury verdict for plaintiffs). Additionally, even if successful,

the road to recovery in complex, contingent cases can be long. *See*, *e.g.*, *In re Apollo Grp., Inc. Secs. Litig.*, 2008 WL 3072731 (D. Ariz. Aug. 4, 2008), *rev'd*, 2010 WL 5927988 (9th Cir. Jun. 23, 2010) (where trial court overturned unanimous jury verdict for plaintiffs, verdict was reinstated only after appeal and denial of *certiorari* by U.S. Supreme Court).

Further, Lead Counsel brought the first and only such Action against Loma in New York state court; and the only other similar action, brought subsequently in federal court, was dismissed at the pleading stage. *Karolyi v. Loma Negra Compania Industrial Argentina Sociedad Anonima*, 613 F.Supp.3d 795 (S.D.N.Y. 2020). Without Lead Counsel's risk-taking, and skill, there would be no recovery at all for the Class.

In sum, the risk of litigation weighs heavily in favor of Lead Counsel's fee request.

2. *Fiala* Factor Two: [Non-]Existence of Prior Favorable Judgment

Lead Counsel investigated, brought, and litigated this Action without the benefit of any prior judgment against Defendants, or even a parallel regulatory investigation into Loma concerning the issues raised by Plaintiffs' claims. Hopkins Aff., ¶¶81-83. There was also no prior judgment relating to any *affiliates* of Loma relevant to this Action, as Defendants often pointed out; nor was there any earnings restatement to the extent Plaintiff's claims (*e.g.*, related to cement demand) implicated accounting issues. *Id.* Thus, this factor also supports the requested fee.

3. *Fiala* Factor Three: Counsel's Standing in the Securities Bar

Lead Counsel, Levi & Korsinsky LLP, is highly experienced in securities litigation, with a track record of success. *See generally* NYSCEF No. 76; Affirmation of Shannon Hopkins on Behalf of Levi & Korsinsky in Support of Application for Attorneys' Fees and Expenses ("Levi & Korsinsky Aff."), Ex. D (firm resume). Lead Counsel also respectfully submits that its skill and experience were important factors in obtaining a successful result for the Class here. Moreover, *Fiala* Factor 3 indicates that Lead Counsel's success should also be evaluated in light of the quality

of opposing counsel, which here consisted of two pre-eminent firms, White & Case LLP and Shearman & Sterling LLP. That Lead Counsel obtained a $24.6 million Settlement in this challenging litigation against such formidable opposition, who vigorously contested Plaintiff's case throughout the litigation, including appealing virtually every decision in Plaintiff's favor, further supports the requested fee.

4. *Fiala* Factor Four: Magnitude and Complexity of the Action

For all of the same reasons that the "complexity" and "litigation risk" factors strongly support approval of the Settlement (*see supra* §I.A.; Hopkins Aff., ¶¶61-68), these factors weigh equally in favor of approving a one-third fee. Additionally, with reasonably recoverable damages substantially over $100 million (Hopkins Aff., ¶4); a corporate defendant that was Argentina's largest cement manufacturer and part of an international conglomerate; and a case involving transnational activity and discovery, the magnitude of this Action is indisputable.

5. *Fiala* Factor Five: Amount Recovered

The Settlement represents an excellent result in light of the significant litigation risks and maximum reasonably recoverable damages, and Defendants' firm position that the Class's recoverable damages were zero, or at best, extremely limited. As explained in the Hopkins Aff., the $24.6 million cash Settlement represents a 7.41%% recovery of damages in Plaintiff's best-case scenario where Plaintiff prevailed on all liability issues and obtained the maximum, presumptive statutory damages under Section 11(e) of the Securities Act. The Settlement represents 22.8% of the most likely recoverable damages estimated by Plaintiff's expert of approximately $107,862,619, after disaggregating damages for the impact of negative disclosures and market factors on Loma's ADS price unrelated to the allegations in Plaintiff's case. *Id.*

The Settlement Amount is almost double to five times the average percentage recovery in similar cases, and more than three times the average dollar-value recovery. *See* L. Bulan and L.

Simmons, Securities Class Action Settlements – 2022 Review and Analysis, CORNERSTONE RESEARCH, at 7 (2023) (noting median settlement of Section 11 cases as a percentage of estimated damages in 2022 and 2021 was 4.7% and 4.4% respectively, and 2022 median settlement was $7.0 million); *see also* *WideOpenWest*, 653248/2018, NYSCEF No. 145, at 1 (one-third fee awarded where $7.025 million settlement recovered 4.5% of maximum damages); *Netshoes*, 157435/2018, NYSCEF No. 145 at 8 (one-third fee awarded where $8 million settlement recovered 7.6% of maximum damages); Hopkins Aff. ¶4.

Accordingly, this factor also supports the requested fee.

6. *Fiala* Factor Six: Fees Charged (Or Awarded) in Comparable Cases

A court-awarded fee is intended to approximate what counsel would receive if they were bargaining for their services in the marketplace. *See* *Missouri v. Jenkins*, 491 U.S. 274, 285-86 (1989). If this were a non-class action, the customary contingent fee arrangement would be in the range of one-third to 40% of the recovery. *See* *Blum v. Stenson*, 465 U.S. 886, 902 n.19 (1984) ("In tort suits, an attorney might receive one-third of whatever amount the plaintiff recovers. In those cases, therefore, the fee is directly proportional to the recovery.") (Brennan, J., concurring).

Moreover, as noted in footnote 9 above, both state and federal courts in New York (and across the country) have frequently awarded percentage-based fees of 33⅓ % (or more) in other securities actions that have settled for comparable amounts. Accordingly, the requested fee is well within the "range of reasonableness", and this factor also supports the fee request.

7. *Fiala* Factor Seven: The Work Performed

As stated in the Hopkins Affirmation and accompanying exhibits, Lead Counsel spent over 11,000 hours and $7,400,360.50 in lodestar litigating this Action for over five years, from Plaintiff's initial factual case investigation, through motions to dismiss, class certification, discovery involving the review of over 750,000 pages of documents that Defendants produced in

multiple languages (many in Spanish in Portuguese), several discovery motions, summary judgment, and multiple appeals—culminating in protracted settlement negotiations. Hopkins Aff. ¶¶14-57, 79, 91. Lead Counsel submit that both the amount of work performed, as well its quality (reflected by, *inter alia*, their success in defeating Defendants' motion to dismiss and summary judgment and multiple appeals, as well as the quality of the papers submitted to this Court and the First Department), also supports the requested fee.

C. The Reasonableness of the Requested One-Third Fee Is Confirmed By a "Lodestar Crosscheck"

As noted, courts routinely confirm the reasonableness of a requested percentage-based fee by performing a "lodestar crosscheck." To calculate the relevant lodestar, a court takes the hours billed by each timekeeper (attorney or para-professional) and multiplies them by that timekeeper's current hourly rate, which, added together, yields counsel's overall lodestar. *See, e.g.,* *Ousmane v. City of New York*, No. 402648/2004, 2009 WL 722294, at *9 (Sup. Ct., N.Y. Cnty. Mar. 17, 2009). The Court then cross-checks the effective dollar value of the requested percentage-based fee against counsel's lodestar to determine whether the requested fee would result in an unreasonably high "multiplier" on counsel's lodestar. *See, e.g., Clemons v. A.C.I. Found., Ltd.*, No. 154573/2015, 2017 WL 1968654, at *5 (Sup. Ct., N.Y. Cnty. May 12, 2017).

As stated, Lead Counsel devoted approximately 11,073 hours to the investigation, litigation, and ultimate resolution of this Action over more than five years, resulting in total lodestar of ***$7,400,360.50*** when multiplied by Lead Counsel's current hourly rates (as accepted by other courts across the country in fee award contexts[10]). *See* Hopkins Aff. ¶91, Levi & Korsinsky

[10] *See, e.g., WideOpenWest*, 653248/2018, NYSCEF No. 145, at 1 (accepting Levi & Korsinsky's current hourly rates in approving fee request); *see also* *Voulgaris v. Array Biopharma, Inc.*, 60 F.4th 1259, 1267 (10th Cir. 2023) (same); *In re Aqua Metals, Inc. Secs. Litig.*, 2022 WL 612804, at *8 (N.D. Cal. Mar. 2, 2022) (same).

Aff. ¶4, and Exs. A-B thereto. The requested one-third fee equating to $8,200,000, thus, represents a very modest multiplier of 1.108 to Lead Counsel's total lodestar.[11]

Given that both state and federal courts in New York routinely award percentage-based awards that result in "positive" multipliers of two to four times the value of counsel's lodestar, *a fortiori* a percentage-based award that, as here, results in a negligible 1.108 multiplier on Lead Counsel's lodestar is plainly reasonable. *See, e.g.*, *Taft v. Ackermans*, 2007 WL 414493, at *11 (S.D.N.Y. Jan. 31, 2007) (describing 1.44x multiplier as "modest in relation to lodestar multipliers frequently used in this district"); *In re BioScrip, Inc. Secs. Litig.*, 273 F. Supp.3d 474, 497 (S.D.N.Y. 2017) (lodestar crosscheck multiplier of 1.39x "is at the lower range of comparable awards").

In sum, all of the foregoing factors strongly support the requested one-third fee.

D. The Reaction of the Class Also Supports the Requested Fee

Many courts also consider the reaction of the class and the views of the lead plaintiff. *See, e.g., In re Signet Jewelers Ltd. Sec. Litig.*, 2020 WL 4196468, at *6 (S.D.N.Y. July 21, 2020); *In re Bear Stearns Cos., Inc. Sec., Derivative, & ERISA Litig.*, 909 F. Supp. 2d 259, 266 (S.D.N.Y. 2012); *see also In re Health Ins. Innovations Secs. Litig.*, 2021 WL 1341881, at *12 (M.D. Fla. Mar. 23, 2021) (lead plaintiff support). Here, Class Representative Dan Kohl supports the requested fee. Kohl Affidavit ¶11. Additionally, approximately 20,754 Notices were timely mailed to Class Members pursuant to the Court's Preliminary Approval Order describing the one-

[11] *See* cases cited §III.A. above. Lead Counsel also note that their lodestar does not include any time for work performed since December 4, 2023 (the date of the Court's filing of the Preliminary Approval Order), including time spent on preparing the materials in support of final approval of the Settlement or the "[additional] time that they will be required to spend administering the settlement going forward." *Fernandez*, 2015 WL 3932897, at *6. Lead Counsel also excluded timekeepers with less than ten hours billed to the case.

third fee amount sought, and although the March 20, 2024 deadline for objections as not yet passed, to date no objections to Lead Counsel's requested fee have been received. Hopkins Aff. ¶9; Cavanaugh Aff. ¶¶11, 17.

E. Lead Counsel's Expenses Were Reasonably Incurred and Necessary to the Prosecution of This Action

Lead Counsel requests reimbursement of $240,088.20 in total litigation expenses—approximately $10,000 less than disclosed in the Notice. These expenses consist primarily of the costs of hiring an investigation firm, expert-consultant fees, document hosting platform fees, translation costs, mediation costs, online legal and financial research, filing, photocopying/printing and expedited mail delivery – all of which were reasonably necessary to Plaintiffs' successful efforts in this case. *See* Hopkins Aff., ¶92, Levi & Korsinsky Aff., ¶¶7-8 & Ex. C; *see* *In re Flag Telecom Holdings, Ltd. Sec. Litig.*, 2010 WL 4537550, at *30 (S.D.N.Y. Nov. 8, 2010) ("It is well accepted that counsel who create a common fund are entitled to the reimbursement of expenses that they advanced") (noting expenses such as fees for filing, document database, online research, foreign counsel, photocopying, travel and mailing "and other expenses directly related to the prosecution of this Action" were "customary and necessary expenses for a complex securities action," and approving these along with investigatory and damage expert expenses); *see also* *Netshoes*, 157435/2018, NYSCEF Nos. 129 at 3-4, 141 at 8 (approving similar expenses including translation costs).

To date, no Class member has objected to Lead Counsel's expense request, which further supports the reasonableness of the requested expenses. *See* Hopkins Aff. ¶93.

F. The Requested $10,000 Service Award to the Sole Class Representative Is Reasonable

As detailed in his Affirmation, Plaintiff Kohl took his fiduciary role as the sole named plaintiff and Court-appointed Class Representative seriously by, *inter alia*, reviewing pleadings

and briefs; responding to discovery requests; collecting and producing documents; preparing for and sitting for a lengthy deposition; and consulting with Lead Counsel regarding both litigation and settlement matters. Kohl Aff. ¶¶2-9. As the sole named Plaintiff in the only surviving Action against Loma, without Plaintiff's efforts in commencing and prosecuting this action, there would be no recovery for the Class. Moreover, the requested service award is modest and less than or equal to those approved in other cases. *Compare*, *e.g.*, *Lopez*, 2015 WL 5882842, at *3-*4, *8 (awarding $20,000); *Martínek v. Amtrust Financial Services, Inc.*, 2022 WL 16960903, at *2-3 (S.D.N.Y. Nov. 16, 2022) (awarding $15,000); *Mancia v. HSBC Securities (USA) Inc.*, 9400/2015, 2016 WL 833232 (Sup. Ct., Kings Cty. Feb. 19, 2016) ($15,000); *Charles*, 2017 WL 6539280, at *2-*3, *5 ($10,000). Further, that the Notice informed Class Members of the amount of the service award that would be sought, and no Class Member has objected to date, further supports the reasonableness of the requested service award.

Accordingly, Plaintiff respectfully requests that the Court grant the service award of $10,000.

IV. CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that this Court (a) enter the proposed Order Granting Final Approval of Class Action Settlement; (b) award Lead Counsel attorneys' fees of $8.2 million (one-third of the $24,600,000 recovery); (c) award Lead Counsel their litigation expenses in the amount of $240,088.20, consistent with the terms of the Stipulation of Settlement; and (d) award $10,000 to Plaintiff for his service to the Class.

DATED: March 6, 2024

Respectfully submitted,

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PRINTING SPECIFICATIONS STATEMENT

1. Pursuant to 22 N.Y.C.R.R. §202.70(g), Rule 17, the undersigned counsel certifies that the foregoing memorandum of law was prepared on a computer using Microsoft Word. A proportionally spaced typeface was used as follows:

Name of Typeface: Times New Roman
Point Size: 12
Line Spacing: Double

2. The total number of words in the memorandum, inclusive of point headings and footnotes and exclusive of the caption, signature block, and this Certification, is 6,963 words.

DATED: March 6, 2024

Respectfully submitted,

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