IN THE CIRCUIT COURT FOR MORGAN COUNTY
NINTH JUDICIAL DISTRICT
THE STATE OF TENNESSEE

MARCIA GOLDBERG, Individually and on Behalf of All Others Similarly Situated, Plaintiff, vs. DELOY MILLER, et al,, Defendants.	Case No. 2015-CV-33 Judge Pemberton
KENNETH GAYNOR, Individually and on Behalf of All Others Similarly Situated, Plaintiff, vs. DELOY MILLER, et al, Defendants.	Case No. 2015-CV-34 Judge Pemberton

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR FINAL APPROVAL OF SETTLEMENT AND APPROVAL OF PLAN OF ALLOCATION AND FOR AN AWARD OF ATTORNEYS' FEES AND EXPENSES AND AWARDS TO PLAINTIFFS PURSUANT TO 15 U.S.C. §77z-1(a)(4)

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I. INTRODUCTION

After more than seven years of hard fought litigation, Plaintiffs' Counsel have secured a substantial and certain $7.6 million benefit for purchasers of Miller Energy Resources, Inc.'s ("Miller Energy" or the "Company") 10.75% Series C Cumulative Redeemable Preferred Stock ("Series C") and 10.5% Series D Fixed Rate/Floating Rate Cumulative Redeemable Preferred Stock ("Series D") in the public offerings of those securities (the "Offerings"). The complete terms of the Settlement are set forth in the Stipulation and Agreement of Settlement dated January 6, 2023 ("Stipulation" or "Settlement"),[1] filed with the Court on February 22, 2023. The Settlement brings to a close hard-fought litigation over whether the offering materials for the Offerings were materially false and misleading, in violation of the Securities Act of 1933 ("Securities Act").

The case was hotly contested from its inception. *See generally*, the Affidavit of Stephen R. Astley in Support of Plaintiffs' Motion for Final Approval of Settlement and Approval of Plan of Allocation and for an Award of Attorneys' Fees and Expenses and Awards to Plaintiffs Pursuant to 15 U.S.C. §77z-1(a)(4) ("Astley Aff." or "Astley Affidavit"), submitted herewith. Prior to reaching the Settlement, Plaintiffs, through their counsel, litigated their claims in federal court when they were removed initially from this Court, successfully filed a renewed remand motion with the United States District Court for the Eastern District of Tennessee ("Federal Court") following issuance of the *Cyan* decision by the Supreme Court; litigated Plaintiffs' class certification motion and discovery disputes; addressed bankruptcy issues upon Miller Energy's Chapter 11 filing; reviewed and analyzed more than 1.5 million pages of documents produced by Defendants and third parties, and engaged in extensive settlement negotiations, including mediation with Michelle Yoshida of Phillips ADR, a highly respected mediator with extensive experience in the mediation of complex class

[1] Unless otherwise defined herein, all capitalized terms shall the same meanings as set forth in the Stipulation.

action litigation, and the Hon. Christopher H. Steger, a magistrate judge in the Eastern District of Tennessee.

By this motion, Plaintiffs, Kenneth Gaynor, Marcia Goldberg, and Christopher R. Vorrath, seek final approval of the Settlement, of the Plan of Allocation of the settlement proceeds to Settlement Class Members, as well as an award of attorneys' fees to be paid from the Settlement Fund, plus payment of expenses incurred by counsel in reaching this highly favorable result, and modest awards to Plaintiffs pursuant to 15 U.S.C. §77z-1(a)(4) for their unwavering efforts on behalf of the Settlement Class since 2015.

As demonstrated herein and in the Astley Affidavit, the Settlement achieves a highly favorable resolution of this Litigation and is undoubtedly in the best interests of the Settlement Class. Plaintiffs' Counsel's conclusion is based on counsel's extensive investigation and litigation efforts; the review and analysis of documents produced by Defendants and third parties; the hard-fought settlement negotiations; Plaintiffs' Counsel's vast experience in other class actions; the strengths and weaknesses of the claims and defenses asserted; the sources and availability of fund for recovery; and the related risks, expense and delay of continued litigation. The Settlement meets all indicia of fairness and merits this Court's approval. The Plan of Allocation is likewise fair and reasonable as it distributes the Net Settlement Fund on a *pro rata* basis, based on which security was purchased or acquired, to those Settlement Class Members who submit valid claim forms.

The requested attorneys' fees and expenses are also reasonable under Tennessee law. Plaintiffs' Counsel took this matter on a purely contingent basis with the very real possibility of no payment. The risk of no payment was highlighted in this Litigation by the partial dismissal of Plaintiffs' claims by the Federal Court and Miller Energy's bankruptcy in late 2015. Indeed, "[p]recedent is replete with situations in which attorneys representing a class have devoted substantial resources in terms of time and advanced costs yet have lost the case despite their

advocacy." *In re Xcel Energy, Inc.*, 364 F. Supp. 2d 980, 994 (D. Minn. 2005). Over the last seven-plus years Plaintiffs' Counsel have devoted substantial time and resources in litigating this action for the benefit of the Settlement Class. As a result of their experience, abilities, and efforts, Plaintiffs' Counsel achieved a highly favorable resolution of this complex litigation and have conferred a substantial benefit on behalf of the Settlement Class, and, thus, deserve to be compensated for their efforts. The requested fee of 33% of the Settlement Fund is well within the range of fees awarded in class actions nationwide and is especially warranted here in light of the recovery obtained for the Settlement Class, the extensive efforts of Plaintiffs' Counsel in obtaining this result, and the significant risks in bringing and prosecuting this Litigation. Likewise, the payment of Plaintiffs' Counsel's expenses of $657,165.78, which were necessarily incurred in the prosecution of the Litigation and reasonable in amount, should be paid. Finally, the modest awards to Plaintiffs to reimburse them for their time and expenses in representing the Settlement Class should be paid.

Settlement Class Members appear to agree with Plaintiffs' Counsel's conclusion. Pursuant to an Order of this Court dated March 7, 2023 (the "Preliminary Approval Order"), 14,300 copies of the Notice of Pendency of Class Action, Proposed Class Action Settlement, and Motion for Attorneys' Fees and Expenses (the "Notice") and Proof of Claim and Release ("Proof of Claim") (collectively, "Claim Package") were mailed to potential members of the Settlement Class.[2] In addition, the Summary Notice was published in *The Wall Street Journal* and over *Business Wire* on March 28, 2023. Murray Aff., ¶11. The Notice contained a description of the nature of the Litigation and the terms of the Settlement, the manner in which the settlement proceeds will be allocated among Settlement Class Members who send in valid claims, counsel's request for an award of attorneys' fees and expenses, and Plaintiffs' request for PSLRA awards. The Notice also advised

[2] *See* paragraphs 5-10 to the accompanying Affidavit of Ross D. Murray Regarding Notice Dissemination, Publication, and Requests for Exclusion Received to Date ("Murray Aff.").

Settlement Class Members of their right to, and procedure for, objecting to any aspect of the Settlement as well as their right to, and procedure for requesting exclusion from the Settlement Class. While the last day to file objections to the Settlement with the Court and serve them upon the parties' counsel has not yet expired, to date not a single Settlement Class Member has objected to any aspect of the Settlement, the Plan of Allocation, or counsel's request for an award of attorneys' fees and expenses.[3]

In short, as explained in detail below and in the Astley Affidavit, the Settlement and Plan of Allocation are fair, reasonable and adequate, and should be approved. Moreover, the requested amount of attorneys' fees and expenses are fair and reasonable given the efforts of counsel in achieving the highly favorable result for the Settlement Class and should be approved by the Court. Finally, modest awards to Plaintiffs in accordance with 15 U.S.C. §77z-1(a)(4) should be granted.

II. HISTORY OF THE LITIGATION

A. The Litigation

On November 9, 2015, Gaynor (*Gaynor v. Miller*, No. 2015-CV-34) and Goldberg (*Goldberg v. Miller*, No. 2015-CV-33) filed complaints in this Court alleging violations of Sections 11, 12(a)(2), and 15 of the Securities Act, 15 U.S.C. §§77k, 77l(a)(2), and 77o, relating to offerings of Miller Energy's Series C and Series D (collectively, "Offerings"), against former officers and directors of Miller Energy and the underwriters of the Offerings. In response, on December 9, 2015, the Underwriter Defendants, pursuant to 28 U.S.C. §§1441 and 1446, removed both cases to the United States District Court for the Eastern District of Tennessee, Knoxville Division. *See Gaynor v. Miller*, No. 3:15-cv-00545 ("*Gaynor* Action"), ECF 1; *Goldberg v. Miller*, No. 3:15-cv-00546 ("*Goldberg* Action"), ECF 1. On January 8, 2016, Gaynor and Goldberg each filed motions to

[3] The deadline for objections is May 23, 2023. If any objections are received, they will be addressed in a reply brief which will be filed no later than June 5, 2023.

remand which were denied on September 8, 2016, resulting in the continuation of the Litigation in federal court. ECF 73.[4]

On November 7, 2016, the Federal Court entered an order consolidating the *Gaynor* Action, *Goldberg* Action, and another related action, *Hull v. Miller*, No. 3:16-cv-00232 (E.D. Tenn.) ("*Hull* Action") (collectively, "Federal Action"), finding they "present[ed] common questions of law or fact[,]" as they involved the same subject matter and presented the same legal issues. ECF 84, at 3. The following day, Plaintiffs moved for appointment as Lead Plaintiffs, along with Gabriel R. Hull ("Hull"), under the Private Securities Litigation Reform Act of 1995. ECF 86-87. In the Order dated December 27, 2016, the Federal Court appointed Gaynor, Goldberg, Vorrath, and Hull as Lead Plaintiffs, Robbins Geller as Lead Counsel, and Barrett Johnston Martin & Garrison, LLC ("Barrett Johnston") as Local Counsel. ECF 91.

The operative complaint, the Master Consolidated Complaint, was filed on January 5, 2017 ("Master Complaint"). ECF 92. The Master Complaint alleges violations of Sections 11, 12(a)(2), and 15 of the Securities Act, on behalf of persons who purchased or otherwise acquired the securities of Miller Energy pursuant and/or traceable to the September 6, 2012 registration statement ("Registration Statement") and prospectus supplements that were issued in connection with the Offerings. The named defendants are the Underwriter Defendants and the Individual Defendants. The Master Complaint alleges that Plaintiffs' strict liability claims arise from Miller Energy's false and misleading financial accounting and reporting related to the valuation of certain oil and gas assets ("Alaska Assets"). The Master Complaint also alleges that in December 2009, Miller Energy purchased the Alaska Assets for $2.25 million in cash, along with the assumption of certain liabilities valued at approximately $2 million and, within weeks, reported them at an overstated

[4] All references to "ECF __" herein refer to the *Gaynor* Action unless otherwise defined.

value of approximately $480 million, and recognized a one-time "bargain purchase gain" of $277 million for its fiscal third quarter ended January 2010 and fiscal year ended April 2010. *Id*.

When computing that fair value of the Alaska Assets, Plaintiffs allege that Miller Energy improperly relied on a reserve report ("Reserve Report") prepared by an independent petroleum engineering firm. The Reserve Report, however, was not a basis to calculate an estimate of fair market value of the Alaska Assets and explicitly stated that "[t]he discounted values shown are for your information and should not be construed as our estimate of fair market value." ¶70.[5] Moreover, the engineering firm that drafted the Reserve Report expressly stated that Miller Energy would ***not*** use the Reserve Report as a measure of the fair market value for the Alaska Assets. Nevertheless, Miller Energy improperly used the Reserve Report as the only support for fair market value of the Alaska Assets. Accordingly, Plaintiffs assert that the Offerings incorporated by reference certain periodic financial reporting filings Miller Energy had previously made with the U.S. Securities and Exchange Commission ("SEC"), as well as all future filings occurring up until the termination of the Offerings, including the overstated value of the Alaska Assets.

Following the close of the Offerings, Plaintiffs allege that a series of disclosures revealed that the Registration Statement was false and misleading at the time issued because the Company overstated the value of the Alaska Assets. For example, on August 20, 2015, Miller Energy disclosed that the Company had reached an agreement in principle with the SEC's Enforcement Division, wherein the Company agreed to pay a $5 million penalty and to restate its financial statements containing false financial information related to the valuation of the overstated 2009 acquisition of the Alaska Assets and the subsequent financial results derived from that information. Similarly, on August 15, 2017, the SEC announced that KPMG LLP, Miller Energy's independent auditor, agreed to pay $6.2 million to settle charges that it failed to properly audit Miller Energy's

[5] Citations to "¶__" refer to paragraphs of the Master Complaint.

financial statements. In September 2015, Miller Energy's Series C and Series D preferred shares were delisted after a more than 98% decline in value. Shortly thereafter, Miller Energy filed for bankruptcy protection under Chapter 11.

On February 16 and 21, 2017, Defendants filed motions to dismiss the Master Complaint. Following extensive briefing on Defendants' motions to dismiss, ECF 95-99, 102-105, the Federal Court granted in part and denied in part Defendants' motions to dismiss. ECF 106. In doing so, Plaintiffs' Section 11 claims against the Underwriter Defendants and Section 15 claims against the Individual Defendants were upheld. *Id*. On September 25, 2017, Defendants filed their answers and defenses to the Master Complaint. ECF 111-112. Specifically, Defendants denied, and continue to deny, each and all of the Master Complaint's allegations. ECF 112. Defendants contend, in part, that Plaintiffs lack standing to pursue their claims, that their claims are time barred, and that they reasonably relied on the expertise of Miller Energy's auditors. *Id*.

Plaintiffs engaged in a thorough investigation, and requested and received extensive discovery from Defendants and numerous third parties, resulting in the production of more than 1.5 million pages of documents. On January 19, 2018, Plaintiffs moved for class certification seeking to: (i) certify the proposed Class of Series C and Series D Preferred Stock shareholders; (ii) appoint Gaynor, Goldberg, Hull, and Vorrath as Class Representatives; and (iii) appoint Robbins Geller as Class Counsel and Barrett Johnston as Local Class Counsel. ECF 130. Defendants did not challenge the Rule 23 elements of numerosity, typicality, commonality, or superiority, but instead focused their opposition to the motion on affirmative defenses related to predominance, including, but not limited to, arguing that individual inquiries will determine whether each Class member can trace his or her shares to a particular Offering and whether Plaintiffs' claims are time barred. Defendants also attacked the adequacy of Plaintiffs as potential Class Representatives. ECF 140.

On August 6, 2018, Magistrate Judge Poplin issued a Report and Recommendation granting Plaintiffs' motion for class certification in its entirety. ECF 167.[6]

On June 1, 2018, Plaintiffs filed a Renewed Motion to Remand predicated on *Cyan, Inc. v. Beaver Cnty. Emps. Ret. Fund*, __ U.S. __, 138 S. Ct. 1061, 1078 (2018). ECF 155. On August 9, 2018, the Federal Action was stayed for mediation. ECF 170. The Federal Action remained stayed until December 5, 2019, when the Court lifted the stay and set jury trial for July 7, 2020. ECF 184. The next day, the Court granted Plaintiffs' Renewed Motion to Remand. ECF 185. The parties continued to litigate the Federal Action, until March 31, 2020, when the Court issued an Order clarifying remand, dismissing the case without prejudice, and directing the clerk to close the case. *Hull* Action. ECF 232.

B. The Settlement

On August 8, 2018, the other Underwriter Defendants and Plaintiffs agreed to pursue mediation and jointly moved the Court for a temporary stay of the Litigation. On September 5, 2018, mediation was held with Michelle Yoshida of Phillips ADR and involved an extended effort to settle the claims against the Underwriter Defendants and was preceded by the submission and exchange of mediation statements. Although the mediation was unsuccessful, the parties continued to engage in settlement discussions thereafter. On April 9, 2019, after months of continued negotiations, the parties notified the Federal Court that mediation was unsuccessful and requested the stay be lifted. ECF 181. In response, the Court ordered all parties to mediation with Honorable Christopher H. Steger, a Magistrate Judge in the Eastern District of Tennessee. ECF 182. The mediation was held on August 17, 2019, and failed to result in a settlement. However, negotiations continued following remand, and settlements with certain defendants were reached. Certain non-

[6] The Report and Recommendation granting Plaintiffs' motion for class certification in its entirety is attached hereto as Exhibit 1.

settling defendants objected to those settlements, and additional briefing was provided to this Court. While this Court was considering the various submissions, the parties reached a global settlement of this Litigation.

The Settlement set forth in the Stipulation resolves, fully, finally, and with prejudice, the claims of the Settlement Class against all Defendants. Plaintiffs and Lead Counsel have diligently and vigorously prosecuted this Litigation, and after extensive, arm's-length negotiations with the substantial assistance of Judge Steger, reached an agreement with the Defendants to settle this Litigation, in its entirety, for $7.6 million in cash.

After more than seven years of litigation, a thorough investigation of the factual and legal issues in the Litigation, extensive document discovery, consultation with three experts on Plaintiffs' claims, and consideration of the expense, risk, and delay of continued litigation through trial and potential appeals, especially considering the available sources of funds, Plaintiffs and Lead Counsel have concluded that the substantial and certain monetary recovery obtained for the Settlement Class via this Settlement is a highly favorable result and is in the best interests of the Settlement Class.

On March 8, 2023, the Court entered an order preliminarily approving the Settlement. As a result, Defendants have caused to be paid most of the $7.6 million in cash, into an interest bearing account controlled by the Escrow Agent.[7] This amount, less taxes, costs of notice and claims administration, and attorneys' fees and expenses awarded by the Court, will be distributed, *pro rata*, to Settlement Class Members who submit valid Proofs of Claim by the Court-ordered deadline based on which Miller Energy security was purchased or acquired.

[7] $249,500 of the $7.6 million has not yet been received due to the current incarceration of Defendant Charles Stivers, and the failure of certain defendants to fund their portions of the Settlement Amount. Lead Counsel intends to enforce the Judgment against those non-paying defendants.

III. THE PROPOSED SETTLEMENT IS FAIR, REASONABLE, AND ADEQUATE

A. Applicable Standards

The law has always favored the compromise of disputed claims. *Williams v. First Nat'l Bank*, 216 U.S. 582, 595 (1910); *Cox v. Shell Oil Co.*, 1995 WL 775363, at *2 (Tenn. Ch. Nov. 17, 1995) (noting that "[c]ompromises are favored in the law"). This presumption is particularly strong in complex corporate class action litigation, such as this one. *Franks v. Kroger Co.*, 649 F.2d 1216 (6th Cir. 1981); *Kahn v. Sullivan*, 594 A.2d 48 (Del. 1991).[8] Settlements of complex class actions contribute greatly to the efficient utilization of scarce judicial resources and achieve the speedy resolution of justice. To approve a class action settlement, the court must find a settlement to be "fair, adequate, and reasonable." *Cox*, 1995 WL 775363, at *14; *Williams v. Vukovich*, 720 F.2d 909, 921 (6th Cir. 1983). The ultimate objective is to determine whether the interests of the class are better served if the litigation is resolved by settlement rather than pursued. *See Bailey v. Great Lakes Canning*, 908 F.2d 38, 42 (6th Cir. 1990). In its evaluation or review of a settlement, the court need not try the issues or decide the merits of the case. *See Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615 (9th Cir. 1982). Rather, the court need only consider the nature of the claims, the possible defenses to the claims, the legal and factual obstacles to be faced by plaintiff at trial, and the delay, expense and complexity of litigation. *See Cox*, 1995 WL 775363, at *10; *Kahn*, 594 A.2d at 63; *Polk v. Good*, 507 A.2d 531, 535 (Del. 1986). As set forth below, a balance of the foregoing criteria fully supports approval of the proposed Settlement. Moreover, a presumption of fairness attaches to a class action settlement reached after arm's-length negotiations by experienced and capable counsel. *Manual for Complex Litigation* §30.42 (3d ed. 1995). Where, as here, experienced

[8] Because Tennessee Rule of Civil Procedure 23 is patterned after Federal Rule of Civil Procedure 23, Tennessee courts are guided by the standards applied in federal class action cases. *Meighan v. U.S. Sprint Commc'ns Co.*, 924 S.W.2d 632, 637 n.2 (Tenn. 1996).

Plaintiffs' Counsel have fully investigated the factual background of the case, engaged in extensive motion practice, reviewed over 1.5 million pages of documents produced by Defendants and third parties, consulted with experts concerning valuation of the Alaska Assets, due diligence, and loss causation and damages, fully evaluated the strengths and weaknesses of Plaintiffs' claims as well as the risk, expense and uncertainty of continued litigation (including sources of recovery), and negotiated at arm's length with the help of experienced and highly respected mediators, the settlement should be approved. *See In re High Pressure Laminate Antitrust Litig.*, 2006 WL 3681147, at *4 (Tenn. Ct. App. Dec. 13, 2006). Indeed, where a settlement is reached in good faith, at arm's length, and with the benefit of discovery, Tennessee courts find a presumption in favor of settlement. *Id.*

B. The Settlement Was Arrived at After Hard-Fought Negotiations Between Experienced Counsel

Plaintiffs' Counsel have many years of experience in litigating shareholder class actions and have negotiated hundreds of other class Action settlements which have been approved by courts throughout the country. Defendants were also represented by highly capable and very experienced counsel who zealously defended their clients. As a result, the Settlement was reached after arm's-length negotiations by experienced counsel on both sides, each with a comprehensive understanding of the strengths and weaknesses of their client's respective claims and defenses.

The parties, through their respective highly experienced counsel, have engaged in vigorous good faith, arm's-length negotiations to resolve the action after more than seven years of litigation with the assistance of experienced mediators. The terms of the Settlement set forth in the Stipulation were extensively debated and negotiated with the resulting relief being the product of compromise by all parties.[9] During these negotiations, Plaintiffs' Counsel zealously advanced the Settlement

[9] This global Settlement follows earlier partial settlements, which were before the Court at the time this agreement was reached.

Class's positions and were fully prepared to continue to litigate (and in fact did) rather than accept a settlement that was not in the best interest of the Settlement Class. The benefits obtained were for all members of the Settlement Class and the Settlement does not provide in any way preferential treatment for any shareholder or group of shareholders.

Accordingly, there is no reason here to question the fairness of the proposed Settlement, or to otherwise question the good faith of the parties to the Settlement. As a result of the negotiation process, Plaintiffs' Counsel – highly experienced in shareholder class action litigation – having carefully considered and evaluated, *inter alia*, the relevant legal authorities and evidence to support the claims asserted against Defendants, the likelihood of prevailing on these claims, and the risk, expense, and duration of continued litigation, have made a considered judgment that the Settlement for $7.6 million is not only fair and reasonable, but under the circumstances is a favorable result for the Settlement Class.

C. The Benefits of the Settlement Outweigh the Risks of Continued Litigation

The substantial benefits of the settlement must be balanced against the expense and delay of litigating numerous pre-trial disputes and the risk of no recovery. *Girsh v. Jepson*, 521 F.2d 153, 157 (3d Cir. 1975) (court must balance the immediacy and certainty of a recovery against the continuing risk of litigation). Here, it is the considered judgment of Plaintiffs and their counsel that the benefits of the Settlement outweigh the risks of continued litigation. Indeed, Plaintiffs' Counsel entered into the Settlement only after obtaining sufficient information to carefully weigh the benefits conferred by the Settlement versus the risks associated with continued litigation.

While Plaintiffs believe that the case against Defendants is meritorious, the uncertainty of any eventual recovery must be weighed against a certain and substantial resolution of the dispute. Here, since the inception of the Litigation, Defendants have adamantly denied any liability, and have

made every effort to dismiss Plaintiffs' claims. Indeed, over the course of the seven years this action was pending, litigation was waged in this Court and the Eastern District of Tennessee, as well as in federal and state courts in Alaska and Texas, and three separate bankruptcy courts. There is no question that if litigation continued, Defendants would continue to vigorously defend this action. Absent settlement, Plaintiffs faced significant challenges to prevailing. Defendants would continue to argue that Plaintiffs' Section 11 claims should be dismissed because the Underwriter Defendants relied on the expertise of auditors and engineers; the Section 11 claims were barred by the statute of limitations; Plaintiffs lacked standing to bring their claims; there were no allegations that the Individual Defendants made any statements; and Plaintiffs could not trace their shares to either of the Offerings. Astley Aff., ¶21. Thus, there is no question that continued litigation would have been fraught with risk with the eventual outcome years down the road highly uncertain.

Plaintiffs' Counsel weighed the expense, length, and uncertainty of continued litigation that would be necessary to take this case through trial and any appeals against the likelihood of obtaining a better result after continued litigation. Based on their evaluation, Plaintiffs' Counsel determined that the $7.6 million settlement provides the Settlement Class with substantial benefits that address the claims and relief sought in the Litigation and is likely far better than Plaintiffs would have been able to recover if the Litigation continued through summary judgment, trial, and appeals.

D. Plaintiffs' Counsel Have Engaged in Sufficient Pretrial Discovery and Proceedings to Evaluate the Propriety of Settlement

The stage of the proceedings is a factor which courts consider in determining the fairness, reasonableness, and adequacy of a settlement. *Williams*, 720 F.2d at 922-23. Here, the Settlement comes after more than seven years of litigation, following extensive document discovery; complex and hard-fought motion practice, including proceedings before numerous state, federal and bankruptcy courts; consultation with experts; and extensive settlement negotiations, including

mediation with Ms. Yoshida and Magistrate Judge Steger, where the merits of Plaintiffs' claims were extensively debated. As a result, both the knowledge of Plaintiffs' Counsel and the proceedings themselves had reached a stage where an intelligent evaluation of the Litigation and the propriety of the Settlement could be made.

There is no question that Plaintiffs and their counsel were in an excellent position to evaluate the strengths and weaknesses of their allegations against Defendants, and the defenses raised thereto, as well as the substantial risks of continued litigation, and to conclude that the Settlement provides a highly favorable result for the Settlement Class. Having sufficient information to properly evaluate the Litigation, Plaintiffs and their counsel have managed to settle this Litigation on terms very favorable to the Settlement Class without the substantial additional expense, risk, delay, and uncertainty of continued litigation. As a result, this factor weighs in favor of this Court's approval of the Settlement.

E. The Recommendations of Experienced Counsel Heavily Favor Approval of the Settlement

Courts recognize that the opinions of experienced counsel supporting a settlement after vigorous arm's-length negotiations are entitled to considerable weight. *New York State Tchrs.' Ret. Sys. v. GMC*, 315 F.R.D. 226, 238 (E.D. Mich. 2016), *aff'd sub nom. Marro v. New York State Teachers Ret. Sys.*, 2017 WL 6398014 (6th Cir. Nov. 27, 2017). As noted in *Nat'l Rural Telecomms. Corp. v. DIRECTV, Inc.*, 221 F.R.D. 523, 528 (C.D. Cal. 2004) (citations omitted):

> "Great weight is accorded to the recommendation of counsel, who are most closely acquainted with the facts of the underlying litigation." This is because "parties represented by competent counsel are better positioned than courts to produce a settlement that fairly reflects each party's expected outcome in the litigation." Thus, "the trial judge, absent fraud, collusion, or the like, should be hesitant to substitute its own judgment for that of counsel."

Here, experienced and highly capable Plaintiffs' Counsel, after extensive, exhaustive investigation and litigation as well as arm's-length settlement negotiations, have concluded that the Settlement is a very favorable result and clearly in the best interest of the Settlement Class.

As described herein and in the Astley Affidavit, this conclusion was reached after Plaintiffs' Counsel acquired a thorough understanding of the strengths and weaknesses of Plaintiffs' claims. Plaintiffs' Counsel have significant experience in securities and other complex class action litigation and have negotiated numerous other substantial class action settlements throughout the country. Where, as here, the settlement is the product of serious, informed non-collusive negotiations after extensive litigation, significant weight should be attributed to the belief of experienced counsel that settlement is in the best interest of the class. *See Armstrong v. Gallia Metro. Hous. Auth.*, 2001 WL 1842452, at *3-*4 (S.D. Ohio Apr. 23, 2001). Likewise, Plaintiffs approve the Settlement. *See* Declaration of Kenneth Gaynor ("Gaynor Decl."), ¶4, Declaration of Marcia Goldberg ("Goldberg Decl."), ¶4, and Declaration of Christopher R. Vorrath ("Vorrath Decl."), ¶3, submitted herewith. "Their support also favors approval." *Karpik v. Huntington Bancshares Inc.*, 2021 WL 757123, at *6 (S.D. Ohio Feb. 18, 2021). Accordingly, this factor supports final approval.

F. The Reaction of the Settlement Class Supports Final Approval

To further support approval of a settlement, courts have looked to the reaction of the class. *Poplar Creek Dev. Co. v. Chesapeake Appalachia, L.L.C.*, 636 F.3d 235, 244 (6th Cir. 2011); *Brotherton v. Cleveland*, 141 F. Supp. 2d 894, 906 (S.D. Ohio 2001). "The lack of objections by class members in relation to the size of the class highlights the fairness of the settlements to unnamed class members and supports approval of the settlements." *In re Se. Milk Antitrust Litig.*, 2013 WL 2155379, at *6 (E.D. Tenn. May 17, 2013). Here, as of May 3, 2023, the Claims Administrator has disseminated 14,300 Claim Packages to potential Settlement Class Members and

nominees. Murray Aff., ¶10. To date, not one Settlement Class Member has objected to any aspect of the Settlement.[10] This factor favors approval of the Settlement.

For all the reasons set forth herein and in the Astley Affidavit, Plaintiffs' Counsel respectfully request that the Court finally approve the Settlement.

IV. THE PLAN OF ALLOCATION IS FAIR AND REASONABLE AND SHOULD BE APPROVED

Assessment of a plan of allocation of proceeds in a class action is governed by the same standards of review applicable to the settlement as a whole – the plan must be fair, reasonable, and adequate. *In re Packaged Ice Antitrust Litig.*, 2011 WL 6209188, at *15 (E.D. Mich. Dec. 13, 2011). The purpose of a plan should be an equitable and fair distribution of the net settlement proceeds. *Beecher v. Able*, 575 F.2d 1010, 1016 (2d Cir. 1978). Therefore, a plan of allocation need only have a reasonable basis, particularly if recommended by competent counsel. *See In re Gulf Oil/Cities Serv. Tender Offer Litig.*, 142 F.R.D. 588, 596 (S.D.N.Y. 1992); *In re Am. Bank Note Holographics, Inc.*, 127 F. Supp. 2d 418, 429-30 (S.D.N.Y. 2001) (same).

As a result, the objective of a plan of allocation is to provide an equitable distribution of available settlement proceeds among eligible class members. Here, the Plan of Allocation is very straightforward and was set forth in the Notice mailed to Settlement Class Members. Under the Plan of Allocation, the Net Settlement Fund will be divided *pro rata* among Authorized Claimants based on the statutory calculation of loss under Section 11 of the Securities Act, and the type of Miller Energy security purchased or acquired. This plan will result in a fair distribution of the available proceeds among those Settlement Class Members who submit valid claims. No Settlement Class Members have objected to this Plan of Allocation.

[10] As set forth in the Notice, the deadline to provide the Court and counsel with objections is May 23, 2023.

V. THE REQUESTED FEE AND EXPENSE AMOUNT IS FAIR AND REASONABLE AND SHOULD BE APPROVED

A. A Reasonable Percentage of the Fund Recovered Is the Appropriate Approach to Awarding Attorneys' Fees in Common Fund Cases

For their tireless efforts on behalf of the Settlement Class since 2015, Plaintiffs' Counsel seek a reasonable share of the common fund created by their efforts. The percentage method is the appropriate method of fee recovery because, among other things, it aligns the lawyers' interest in being paid a fair fee with the interest of the class in achieving the maximum recovery under the circumstances. Fee awards representing a percentage of the fund recovered have become an accepted if not the prevailing method for awarding attorneys' fees in common fund cases throughout the United States.

It has long been recognized that an attorney who recovers a common fund for the benefit of a class of persons is entitled to recover attorneys' fees and expenses payable from that fund. *Hobson v. First State Bank*, 801 S.W.2d 807, 809 (Tenn. Ct. App. 1990) (citing *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478-79 (1980); *Vincent v. Hughes Air W., Inc.*, 557 F.2d 759 (9th Cir. 1977)). *See also Smillie v. Park Chem. Co.*, 710 F.2d 271, 275 (6th Cir. 1983). This rule, known as the common fund doctrine, is firmly rooted in American case law. *See, e.g.*, *Trustees v. Greenough*, 105 U.S. 527 (1882); *Cent. R.R. & Banking Co. v. Pettus*, 113 U.S. 116 (1885).[11]

In *Blum v. Stenson*, 465 U.S. 886 (1984), the United States Supreme Court stated that the percentage method of computing fees was the proper approach in the "common fund" context where, as here, the fees are paid out of (not in addition to) the fund recovered:

> ***Unlike the calculation of attorney's fees under the "common fund doctrine," where a reasonable fee is based on a percentage of the fund bestowed on the class***, a reasonable fee under §1988 reflects the amount of attorney time reasonably expended on the litigation.

[11] Tennessee courts rely on federal common law fee jurisprudence. *See Hobson*, 801 S.W.2d at 809; *Wheeler v. Burley*, 1997 WL 528801, at *4 (Tenn. Ct. App. Aug. 27, 1997). Therefore, Plaintiffs' Counsel rely on federal law cases throughout this memorandum.

Id. at 900 n.16 (emphasis added).

In recent years, courts in this country have virtually uniformly shifted to the percentage method in awarding fees in common fund cases because it fosters judicial economy by eliminating any incentive to record unproductive attorney time and it avoids the detailed and time-consuming lodestar analysis. *See In re Telectronics Pacing Sys.*, 186 F.R.D. 459, 483 (S.D. Ohio 1999) ("the preferred method in common fund cases has been to award a reasonable percentage of the fund to Class Counsel as attorneys' fees"), *rev'd and remanded on other grounds*, 221 F.3d 870 (6th Cir. 2000); *In re F&M Distribs., Inc. Sec. Litig.*, 1999 U.S. Dist. LEXIS 11090 (E.D. Mich. June 29, 1999); *In re S. Ohio Corr. Facility*, 173 F.R.D. 205, 217 (S.D. Ohio 1997); *Bowling v. Pfizer, Inc.*, 922 F. Supp. 1261, 1278-79 (S.D. Ohio 1996). Supporting authority for the percentage method is overwhelming.[12]

Compensating counsel in common fund cases on a percentage basis makes good sense. First, it is consistent with the practice in the private marketplace where contingent fee attorneys are customarily compensated on a percentage-of-the-recovery method.[13] Second, it provides Plaintiffs'

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[12] Federal courts favor the percentage-of-recovery approach for the award of attorneys' fees in common fund cases. Two federal circuits have ruled that the ***percentage method is mandatory in common fund cases***. *Swedish Hosp. Corp. v. Shalala*, 1 F.3d 1261 (D.C. Cir. 1993); *Camden I Condo. Ass'n v. Dunkle*, 946 F.2d 768, 774-75 (11th Cir. 1991). Other circuits and commentators have expressly approved the use of the percentage method. *Rawlings v. Prudential-Bache Props.*, 9 F.3d 513, 517 (6th Cir. 1993); *In re Wash. Pub. Power Supply Sys. Sec. Litig.*, 19 F.3d 1291, 1296 (9th Cir. 1994); *Gottlieb v. Barry*, 43 F.3d 474 (10th Cir. 1994); *Brown v. Phillips Petroleum Co.*, 838 F.2d 451, 454 (10th Cir. 1988) (footnote 16 of *Blum* recognizes both "implicitly" and "explicitly" that a percentage recovery is reasonable in common fund cases); *Harman v. Lyphomed, Inc.*, 945 F.2d 969, 975 (7th Cir. 1991); *Goldberger v. Integrated Res., Inc.*, 209 F.3d 43 (2d Cir. 2000); Report of the Third Circuit Task Force, *Court Awarded Attorney Fees*, 108 F.R.D. 237, 254 (Oct. 8, 1985).

[13] Courts are encouraged to look to the private marketplace in setting a percentage fee:

> The judicial task might be simplified if the judge and the lawyers bent [sic] their efforts on finding out what the market in fact pays not for the individual hours but for the ensemble of services rendered in a case of this character. This was a contingent fee suit that yielded a recovery for the "clients" (the class members) of $45 million. The class counsel are entitled to the fee they would have received had

Counsel with a strong incentive to effectuate the maximum possible recovery in the shortest amount of time necessary under the circumstances.[14] Third, Congress endorsed the efficacy of the percentage-of-the-fund approach in the context of common fund settlements brought pursuant to the Private Securities Litigation Reform Act of 1995. *See* 15 U.S.C. §77z-1(a)(7); *GMC*, 315 F.R.D. at 243 ("[B]ecause the PSLRA refers to an award of attorneys' fees and expenses in relation to 'a reasonable percentage of the amount of any damages . . . actually paid to the class,' the Court concludes that the percentage-of-the-fund approach is the better method for calculating Lead Counsel's fee award.").

B. Consideration of Relevant Factors Justify the 33% Fee Requested

Plaintiffs' Counsel seek a fee award of 33% of the fund that they created and submit that such an award is reasonable and appropriate under the circumstances. The ultimate task for the Court is to ensure that counsel is fairly compensated for the amount of work performed and the results achieved. *Rawlings*, 9 F.3d at 516.

In determining the reasonableness of a fee, the Court should consider the relevant factors from Tennessee Supreme Court Rule 8, RPC 1.5 which are: "(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service

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> they handled a similar suit on a contingent fee basis, with a similar outcome, for a paying client. Suppose a large investor had sued Continental for securities fraud, and won $45 million. What would its lawyers have gotten pursuant to their contingent fee contract?

In re Cont'l Ill. Sec. Litig., 962 F.2d 566, 572 (7th Cir. 1992).

[14] The contingent fee uses private incentives rather than careful monitoring to align the interests of lawyer and client. The lawyer gains only to the extent his client gains. . . . The unscrupulous lawyer paid by the hour may be willing to settle for a lower recovery coupled with a payment for more hours. Contingent fees eliminate this incentive and also ensure a reasonable proportion between the recovery and the fees assessed to defendants. . . .

At the same time as it automatically aligns interests of lawyer and client, rewards exceptional success, and penalizes failure, the contingent fee automatically handles compensation for the uncertainty of litigation.
Kirchoff v. Flynn, 786 F.2d 320, 325-26 (7th Cir. 1986) (emphasis added).

properly; (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer; (3) the fee customarily charged in the locality for similar legal services; (4) the amount involved and the results obtained; (5) the time limitations imposed by the client or by the circumstances; (6) the nature and length of the professional relationship with the client; (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; (8) whether the fee is fixed or contingent; (9) prior advertisements or statements by the lawyer with respect to the fees the lawyer charges; and (10) whether the fee agreement is in writing."

The reasonableness of an attorney's fee will depend upon the circumstances of the particular case in light of the relevant factors. *White v. McBride*, 937 S.W.2d 796, 800 (Tenn. 1996). As demonstrated below, consideration of the relevant factors applied to the facts of the instant case clearly demonstrate that the requested fee is reasonable and warranted under Tennessee law.

1. The Time and Labor Required

This Litigation, while efficiently managed, required heavy commitments of time, especially during the briefing on: (i) motions for remand; (ii) the motions to dismiss the Complaint; and (iii) the class certification motion. Plaintiffs' Counsel also spent considerable time in drafting the comprehensive and detailed Complaint; reviewing and analyzing over 1.5 million pages of documents produced by Defendants and third parties; consulting with experts; and engaging in extensive settlement negotiations.

The significant effort undertaken by Plaintiffs' Counsel in this complex litigation (over 9,200 hours) ensured the highly favorable result obtained for the Settlement Class and supports the requested fee.

2. The Novelty and Difficulty of the Questions Involved, and the Skill Requisite to Perform the Legal Service Properly

It is well-settled that shareholder litigation such as this one challenging violations of the federal securities laws is extremely difficult and complex. *Grae v. Corr. Corp. of Am.*, 330 F.R.D. 481, 498 (M.D. Tenn. 2019).

As discussed herein and in the Astley Affidavit, this Litigation involved complex legal and factual questions which required a high degree of skill. Here, Plaintiffs' Counsel litigated this Litigation before this Court, the Federal Court, and state, federal and bankruptcy courts across the country. All of the services provided by Plaintiffs' Counsel required substantial experience and expertise in shareholder litigation and bankruptcy law. It was only through the requisite skill of Plaintiffs' Counsel that this highly favorable result was achieved for the benefit of the Settlement Class. Therefore, the novelty, difficulty, and skill requisite to perform the legal service properly support the fee request.

3. The Amount Involved and the Results Obtained

The court should determine "whether class counsel's fees are proportional to the incremental benefits conferred on the class members." *Posey v. Dryvit Sys., Inc.*, 2005 WL 17426, at *2 (Tenn. Ct. App. Jan. 4, 2005). Where, as here, after extensive litigation efforts, Defendants have agreed to pay $7.6 million to the Settlement Class, a 33% fee is more than reasonable.

The $7,600,000 cash settlement is a highly favorable result for the Settlement Class that was achieved as a direct result of the skill and tenacity of Plaintiffs' Counsel. As detailed herein and the Astley Affidavit, there were significant legal and factual roadblocks to obtaining a more favorable outcome in this Litigation. Despite these obstacles, Plaintiffs' Counsel were able to achieve a highly favorable result for the Settlement Class under difficult and challenging circumstances.

Thus, the amount involved and results obtained clearly support the requested award.

4. Whether the Fee Is Fixed or Contingent

The Tennessee Supreme Court has made clear that "[a]n attorney's fee should be greater where it is contingent than where it is fixed." *United Med. Corp. v. Hohenwald Bank & Trust Co.*, 703 S.W.2d 133, 136 (Tenn. 1986). "The contingency factor is based on elementary considerations of fairness and justice." *Cohn v. Nelson*, 375 F. Supp. 2d 844, 862 (E.D. Mo. 2005). As the United States Court of Appeals for the Fourth Circuit explained in *McKittrick v. Gardner*, 378 F.2d 872, 875 (4th Cir. 1967):

> The effective lawyer will not win all of his cases, and any determination of the reasonableness of his fees in those cases in which his client prevails must take account of the lawyer's risk of receiving nothing for his services.

Plaintiffs' Counsel's representation in this Litigation was purely contingent. When Plaintiffs' Counsel undertook representation in this case purely on a contingent basis, it was with the expectation that they would devote significant hours of hard work to the prosecution of an extremely difficult case, without any assurance of receiving fees or even payment of expenses incurred in the prosecution of the Litigation. Unlike counsel for Defendants, who are paid an hourly rate and paid for their expenses on a regular basis, Plaintiffs' Counsel have not been compensated for any time or expense since this case began on November 9, 2015, expending some 9,200 hours, equating to over $6.6 million in lodestar (significantly more than the fee sought here), and have incurred $657,165.78 in expenses in obtaining this result for the Settlement Class, knowing that if their efforts were not successful, no fee would be generated nor would any of the expenses incurred be paid.

Despite the risks of non-payment, Plaintiffs' Counsel never hesitated to do whatever was necessary to properly litigate the action. Plaintiffs' Counsel assumed the difficult tasks of preparing and filing the action proceeding despite the corporate defendant's bankruptcy, reviewing and analyzing more than 1.5 million pages of complex documents, engaging in extensive motion

practice, performing substantial and necessary legal and factual research, retaining experts as needed, and conducting vigorous settlement negotiations to produce the result before the Court.

Courts have consistently recognized that the risk of receiving little or no recovery is a major factor in considering an award of attorneys' fees. For example, in awarding counsel's attorneys' fees in *In re Prudential-Bache Energy Income P'ships Sec. Litig.*, 1994 WL 202394, at *6 (E.D. La. May 18, 1994), the court noted the risks that plaintiffs' counsel had taken:

> Although today it might appear that risk was not great based on Prudential Securities' global settlement with the Securities and Exchange Commission, such was not the case when the action was commenced and throughout most of the litigation. Counsel's contingent fee risk is an important factor in determining the fee award. Success is never guaranteed and counsel faced serious risks since both trial and judicial review are unpredictable. Counsel advanced all of the costs of litigation, a not insubstantial amount, and bore the additional risk of unsuccessful prosecution.

The United States Court of Appeals for the Seventh Circuit confirmed that the risk of loss is real and should be considered in a motion for attorneys' fees. It reversed the district court's order that had rejected counsel's contention that lawyers faced the risk of nonpayment. *Sutton v. Bernard*, 504 F.3d 688, 694 (7th Cir. 2007).

There are other reasons, namely public policy considerations, why this factor of Tennessee Supreme Court Rule 8, RPC 1.5 should be given great weight. The Supreme Court has emphasized that private securities actions such as this one provide "'a most effective weapon in the enforcement' of the securities laws and are 'a necessary supplement to [SEC] action.'" *Bateman Eichler, Hill Richards, Inc. v. Berner*, 472 U.S. 299, 310 (1985); *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 313 (2007). Adequate compensation to encourage attorneys to assume the risk of litigation is in the public interest. Without compensation, it would be difficult to retain the caliber of lawyers necessary, willing, and able to properly prosecute to a favorable conclusion complex, risky, and expensive class actions such as this one. *GMC*, 315 F.R.D. at 244 ("The federal securities laws are

remedial in nature and adequate compensation is necessary to encourage attorneys to assume the risk of litigating private lawsuits to protect investors.").

In complex class action cases, for all practical purposes, experienced counsel for a shareholder plaintiff can only be feasibly retained on a contingent basis. Much of the public would be denied any avenue of redress for violations of the federal securities laws if contingency fees are restricted to the extent that they fail to adequately and fairly compensate plaintiffs' counsel for the services provided, the serious risks undertaken, and the delays normally occurring before compensation is received. *See, e.g.*, *In re Union Carbide Corp. Consumer Prods. Bus. Sec. Litig.*, 724 F. Supp. 160, 169 (S.D.N.Y. 1989) (recognizing that "[a] large segment of the public might be denied a remedy for violations of the securities laws if contingent fees awarded by the courts did not fairly compensate counsel for the services provided and the risks undertaken"). Similar considerations are applicable when determining whether to pay the legitimate expenses incurred by counsel in their efforts to litigate a case and reach a fair and reasonable settlement thereof.

The complexity and societal importance of shareholder litigation calls for the involvement of the most able counsel obtainable. To encourage experienced and skilled attorneys to represent plaintiffs on a contingent basis in this type of socially important litigation, attorneys' fees awarded and expenses paid should reflect this goal. *See In re Se. Milk Antitrust Litig.*, 2013 WL 2155387, at *5 (E.D. Tenn. May 17, 2013) (Attorney fee awards "are necessary to incentivize attorneys to shoulder the risk of nonpayment to expose violations of the law and to achieve compensation for injured parties."). Here, Plaintiffs' Counsel committed significant resources of both time and money to the successful prosecution of this Litigation for the benefit of the Settlement Class. The contingent nature of counsel's representation strongly favors approval of the requested fee.

5. The Time Limitations Imposed by the Client or by the Circumstances

It cannot be seriously disputed that this factor supports the fee request. Like virtually all vigorously contested litigation dealing with violations of the federal securities laws, this Litigation placed significant time limitations on Plaintiffs' Counsel. *See generally* Astley Affidavit. These limitations were exacerbated by the difficult and complex issues involved in this Litigation. *Id.* Significant time limitations were imposed by the massive document review and extensive motion practice. *Id.* This Litigation required a substantial effort from Plaintiffs' Counsel over the seven-plus years the action was pending. This factor clearly supports the requested fee.

6. The Experience, Reputation, and Ability of the Lawyer or Lawyers Performing the Services

The attorneys who prosecuted the Litigation are among the country's most experienced and highly skilled attorneys in the field of shareholder class action litigation. Plaintiffs' Counsel have litigated numerous securities and other complex class action cases in Tennessee and across the country and have been responsible for some of the largest shareholder class action recoveries in both Tennessee and Sixth Circuit history.

Plaintiffs' Counsel moved swiftly to protect the interest of the Settlement Class. It was only through their experience, ability, and tenacity that the substantial benefits for the Settlement Class were achieved in the face of numerous obstacles. Thus, the ability and experience of Plaintiffs' Counsel in this type of complex litigation is plainly demonstrated by the record in this Litigation.

Moreover, the standing of opposing counsel may also be considered in determining an allowance of counsel fees. *See, e.g.*, *In re Warner Commc'ns Sec. Litig.*, 618 F. Supp. 735, 749 (S.D.N.Y. 1985) ("The quality of opposing counsel is also important in evaluating the quality of plaintiffs' counsels' work."), *aff'd*, 798 F.2d 35 (2d Cir. 1986); *In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 467 (S.D.N.Y. 2004) ("Securities Lead Counsel obtained the Settlement in

the face of vigorous opposition by defendants who were represented by some of the nation's leading law firms."). Here, Defendants were represented by experienced, skillful, and well-respected law firms, including some of the nation's most prominent defense firms, as well as capable Tennessee counsel whose abilities are well-known to this Court. These lawyers vigorously defended their clients' interests. The considerable experience and ability of opposing counsel enhances the significance of the result that Plaintiffs' Counsel were able to achieve for the Settlement Class.

7. The Likelihood that the Acceptance of the Particular Employment Will Preclude other Employment by the Lawyer

At the time this Litigation was initiated, it was apparent to Plaintiffs' Counsel that the acceptance of employment in this Litigation would, and in fact substantially did, preclude other employment by Plaintiffs' Counsel. Specifically by devoting over 9,200 hours to the prosecution of this Litigation, at the time this Litigation commenced, Plaintiffs' Counsel were precluded from devoting those hours to other matters.

8. The Fee Customarily Charged in the Locality for Similar Legal Services

Courts often look at fees awarded in comparable cases to determine if the fee requested is reasonable. The fee requested here is "certainly within the range of fees often awarded in common fund cases, both nationwide and in the Sixth Circuit." *Se. Milk*, 2013 WL 2155387, at *3; *In re Skelaxin (Metaxalone) Antitrust Litig.*, 2014 WL 2946459, at *1 (E.D. Tenn. June 30, 2014) ("The Court finds that the requested counsel fee of one third [of $73 million recovery] is fair and reasonable and fully justified. The Court finds it is within the range of fees ordinarily awarded."). Other Tennessee courts are in accord. *Cosby v. KPMG LLP*, 2022 WL 4129703, *2 (E.D. Tenn. July 12, 2022) (awarding one-third fee, plus expenses in $35 million settlement, finding, such fee "'is certainly within the range of fees often awarded in common fund cases, both nationwide and in the Sixth Circuit,' and is appropriate given the excellent result Co-Lead Counsel achieved

notwithstanding substantial risk"); *Jackson County Emps.' Ret. Sys. v. Ghosn, et al.*, No. 3:18-cv-01368, slip op. at ¶3 (M.D. Tenn. Oct. 7, 2022) (awarding one-third fee, plus expenses) (Ex. 2); *Grae v. Corrections Corp. of America*, 2021 WL 5234966, at *1 (M.D. Tenn. Nov. 8, 2021) (awarding one-third of $56 million settlement, plus expenses); *Burges v. BancorpSouth, Inc., et al.*, No. 3:14-cv-01564, slip op. at ¶3 (M.D. Tenn. Sept. 21, 2018) (awarding one-third fee, plus expenses) (Ex. 3); *Morse v. McWhorter*, No. 3:97-0370, slip op. at 1 (M.D. Tenn. Mar. 12, 2004) (awarding 33-1/3% fee, plus expenses) (Ex. 4); *In re Sirrom Cap. Corp. Sec. Litig.*, No. 3-98-0643, slip op. at ¶10 (M.D. Tenn. Feb. 4, 2000) (awarding 33-1/3% of $15 million settlement, plus expenses) (Ex. 5).

In addition, the requested fee is consistent or below the rates in the private marketplace, a result repeatedly encouraged by the courts. *See Cont'l Ill.*, 962 F.2d at 572. In private litigation, attorneys regularly contract for contingent fees between 30% and 40% directly with their clients. *See In re Ikon Office Solutions, Inc., Sec. Litig*, 194 F.R.D. 166, 194 (E.D. Pa. 2000) ("in private contingency fee cases, particularly in tort matters, plaintiffs' counsel routinely negotiate agreements providing for between thirty and forty percent of any recovery"); *In re M.D.C. Holdings Sec. Litig.*, 1990 WL 454747, at *7 (S.D. Cal. Aug. 30, 1990) ("In private contingent litigation, fee contracts have traditionally ranged between 30% and 40% of the total recovery."); *Kirchoff*, 786 F.2d at 323 (observing that "40% is the customary fee in tort litigation" and noting, with approval, contract providing for one-third contingent fee if litigation settled prior to trial). These percentages are the prevailing market rates throughout the United States for contingent representation.

VI. PLAINTIFFS' COUNSEL'S EXPENSES ARE REASONABLE AND WERE NECESSARILY INCURRED TO ACHIEVE THE BENEFIT OBTAINED

Plaintiffs' Counsel also request payment of expenses incurred by them in connection with the prosecution of this Litigation. The affidavits in support of each firm's request for payment of

expenses identify the specific expenses. Plaintiffs' Counsel have incurred expenses in the aggregate amount of $657,165.78 in prosecuting this Litigation on behalf of the Settlement Class.

The appropriate analysis to apply in deciding which expenses are compensable in a common fund case of this type is whether the particular costs are of the type typically billed by attorneys to paying clients in the marketplace.[15] The categories of expenses for which counsel seek payment here are the type of expenses routinely charged to hourly clients and, therefore, should be paid out of the common fund.

Plaintiffs' Counsel incurred expenses for the cost of experts. As noted in the accompanying Affidavit of Stephen R. Astley Filed on Behalf of Robbins Geller Rudman & Dowd LLP in Support of Application for Award of Attorneys' Fees and Expenses, there were issues present in this case that required the engagement of asset valuation, due diligence, and damages experts. These experts were instrumental in assisting counsel to achieve the result obtained for the Settlement Class.

Plaintiffs' Counsel were also required to travel in connection with this Litigation and thus incurred the related costs of meals, lodging, and transportation. Counsel in this case traveled to argue motions, for mediation, and document review. Plaintiffs' Counsel also incurred the costs of computerized research. These are the charges for computerized factual and legal research services, including Lexis Nexis, Accurint, Factiva, PACER, Thomson Financial, and Westlaw. It is standard practice for attorneys to use these services to assist them in researching legal and factual issues. These services allowed counsel to access Miller Energy's SEC filings, perform media searches on Miller Energy, perform legal research, and cite-checking of briefs.

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[15] *See Harris v. Marhoefer*, 24 F.3d 16, 19 (9th Cir. 1994) ("Harris may recover as part of the award of attorney's fees those out-of-pocket expenses that 'would normally be charged to a fee paying client.'") (citation omitted); *see also New Eng. Health Care Emps. Pension Fund v. Fruit of the Loom, Inc.*, 234 F.R.D. 627, 635 (W.D. Ky. 2006) ("In determining whether the requested expenses are compensable, the Court has considered 'whether the particular costs are the type routinely billed by attorneys to paying clients in similar cases.'") (citation omitted).

Other expenses that were necessarily incurred in the prosecution of this Litigation include expenses for mediation, document management, photocopying, filing and witness fees, and postage and overnight delivery. Because these were all necessary expenses incurred by Plaintiffs' Counsel, they should be paid from the Settlement Fund.

VII. PLAINTIFFS ARE ENTITLED TO REIMBURSEMENT OF THEIR REASONABLE COSTS

Plaintiffs each seek approval for awards of $10,000 to compensate them for the time spent directly relating to their representation of the Settlement Class. The PSLRA specifically provides that an "award of reasonable costs and expenses (including lost wages) directly relating to the representation of the class" may be made to "any representative party serving on behalf of a class." 15 U.S.C. §77z-1(a)(4). Numerous courts have approved such awards under the PSLRA to compensate class representatives for the time and effort they spent on behalf of the class. *See, e.g.*, *Cosby*, 2022 WL 4129703, at *3 (awarding plaintiffs $25,000, $10,000, and $10,000 "as reimbursement for their reasonable costs and expenses directly related to their representation of the Settlement Class"); *Grae*, 2021 WL 5234966, at *1 (awarding lead plaintiff $17,525); *Garden City Emps.' Ret. Sys. v. Psychiatric Solutions, Inc.*, 2015 WL 13647397, at *1 (M.D. Tenn. Jan. 16, 2015) (awarding lead plaintiff more than $20,000 for payment of its time spent and costs incurred in representing the class).

As set forth in the accompanying Goldberg, Gaynor, and Vorrath Declarations, each Plaintiff took an active role in the prosecution of the Litigation, including communicating with Lead Counsel regarding issues and developments in the Litigation; reviewing certain documents filed in the case, including the operative Complaint; producing relevant documents; providing deposition testimony; and consulting with counsel concerning the Litigation and settlement strategy. *See* Goldberg Decl., ¶3, Gaynor Decl., ¶3, Vorrath Decl., ¶2. Pursuant to the PSLRA, Plaintiffs' request of $10,000 each is

based on the value of the hours expended participating in and managing this Litigation on behalf of the Settlement Class. The Notice informed potential Class Members that such expenses would be sought (Murray Aff., Ex. A), and no objections have been filed to date.

VIII. CONCLUSION

Based on the foregoing, Plaintiffs' Counsel respectfully urge the Court to approve the Settlement and Plan of Allocation as fair, reasonable, and adequate. In addition, the Court is requested to award attorneys' fees of 33% of the $7.6 million Settlement Fund, plus expenses of $657,165.78, with interest on such fees and expenses at the same net rate as earned by the Settlement Fund. Finally, Plaintiffs' request for awards pursuant to 15 U.S.C. §77z-1(a)(4) in connection with their representation of the Settlement Class should be granted.

DATED: May 9, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 9, 2023, a true and exact copy of the foregoing document has been served via email or First Class Mail to all parties on the attached Service List.

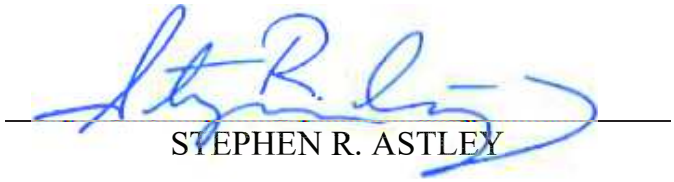

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EXHIBIT 1

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT KNOXVILLE

KENNETH GAYNOR, *et al.,*	)	
	)	
Plaintiffs,	)	
	)	
v.	)	No. 3:15-CV-545-TAV-DCP
	)	
DELOY MILLER, *et al.,*	)	
	)	
Defendants.	)	
	)	*Lead Case Consolidated with*
	)	
MARCIA GOLDBERG, *et al.,*	)	
	)	
Plaintiffs,	)	
	)	
v.	)	No. 3:15-CV-546-TAV-DCP
	)	*as consolidated with*
	)	
DELOY MILLER, *et al.,*	)	No. 3:16-CV-232-TAV-DCP
	)	
Defendants.	)	
	)	

REPORT AND RECOMMENDATION

This case is before the undersigned pursuant to 28 U.S.C. § 636, the Rules of this Court, and the referral Order [Doc. 148] of the Chief District Judge.

Now before the Court is Lead Plaintiffs' Motion for Class Certification [Doc. 130]. The parties appeared before the Court on June 22, 2018, for a motion hearing. Attorneys Stephen Astley, Bailie L. Heikkinen, Christopher Wood, and Curtis Trinko appeared on behalf of Plaintiffs. Attorneys Stacey Mohr and Shayne Clinton appeared on behalf of the Underwriter Defendants.[1]

[1] The Underwriter Defendants include MLV & Co. LLC, Maxim Group, LLC, National Securities Corporation, Aegis Capital Corp., Northland Capital Markets, Dominick & Dickerman, LLC (f/k/a Dominick & Dominick LLC), Ladenburg Thalmann & Co., Inc., and I-Bankers Securities, Inc.

Attorneys Edward Totino and Stephen Marcum were present on behalf of the Individual Defendants.[2] Defendants Scott Boruff, Paul Boyd, and Gerald Hannahs did not attend the hearing. Accordingly, for the reasons set forth below, the Court **RECOMMENDS** that Plaintiffs' Motion [**Doc. 130**] be **GRANTED.**

I. BACKGROUND

This case arises out of alleged violations of the Securities Act of 1933, 15 U.S.C. § 77a. The Master Consolidated Complaint ("Complaint") states that Plaintiffs are a group of individuals who purchased preferred shares traceable to the SEC Form S-3 on September 6, 2012 ("Registration Statement") issued in connection with the public offerings of Miller Energy's 10.75% Series C Cumulative Redeemable Preferred Stock ("Series C") and 10.5% Series D Fixed Rate/Floating Rate Cumulative Redeemable Preferred Stock ("Series D") (collectively, the "Offerings"). [Doc. 92 at ¶ 1]. The Offerings were as follows:

Date	Preferred Shares	Price	Offering Name
Feb. 13, 2013	Series C	$22.90	"2/13/13-Series C"
May 8, 2013	Series C	$22.25	"5/8/13-Series C"
June 28, 2013	Series C	$21.50	"6/28/13-Series C"
Sept. 26, 2013	Series D	$25.00	"9/26/13-Series D"
Oct. 17, 2013	Series D	At Market	"10/17/13-Series D"
Aug. 21, 2014	Series D	$24.50	"8/21/14-Series D"

[2] The Individual Defendants include Deloy Miller, Charles Stivers, David Hall, Merrill McPeak, Don Turkleson, Marceau Schlumberger, Bob Gower, Joseph Leary, William Richardson, and Catherine Rector.

[*Id.*]. Defendants are current and former executive officers and directors of Miller Energy and the investment banking firms that wrote the Offerings. [*Id.* at ¶ 2].

The Complaint alleges that Miller Energy is an independent oil and natural gas exploration, production, and drilling company operating in multiple exploration and production basins in North America. [*Id.* at ¶ 40]. On December 10, 2009, Miller Energy's operating subsidiary, CIE, acquired oil and gas properties in Alaska ("Alaska Assets") for $2.25 million in cash and the assumption of certain limited liabilities. [*Id.* at ¶¶ 41, 45]. On March 22, 2010, Miller Energy claimed in its quarterly report filed on Form 10-Q for its fiscal third quarter ended January 31, 2010, a reported value for the Alaska Assets of approximately $480 million. [*Id.* at ¶ 46]. This evaluation was based on a reserve estimates report ("Reserve Report") prepared for it by an engineering firm. [*Id.*]. The Reserve Report stated that the numbers therein were not an estimate of fair market value. [*Id.* at ¶ 70]. The Complaint states that Miller Energy subsequently repeated the overstated value of the Alaska Assets in numerous filings with the SEC through August 2015. [*Id.* at ¶ 46].

As mentioned above, on September 6, 2012, Miller Energy filed with the SEC a Form S-3 Registration Statement and prospectus, using a "shelf" registration, or continuous offering process. [*Id.* at ¶ 52]. Under the shelf registration, Miller Energy would sell securities described in various future prospective supplements in one or more offerings. [*Id.*]. The prospectus supplements would form part of the Registration Statement for each Offering. [*Id.*]. The Registration Statement, which would later be utilized for all the other Offerings, expressly incorporated by reference certain filings Miller Energy had previously made with the SEC, as well as all future filings, until any offering conducted under the shelf registration statement was completed. [*Id.*]. The SEC declared the shelf Registration Statement effective on September 18, 2012. [*Id.*]. On the date of

each of the Offerings, Miller Energy and the Underwriter Defendants priced the Offerings and filed the final prospectuses for those Offerings, which formed part of the Registration Statement. [*Id.* at ¶ 54]. The Complaint states that the Offerings were successful for Miller Energy and the Underwriter Defendants, who sold upwards of 6.21 million Series C and D shares, raising an estimated $151.015 million in gross proceeds from the Offerings. [*Id.*].

The Complaint alleges that the Registration Statement, including the materials incorporated therein by reference (which expressly incorporated Miller Energy's Annual Report on Form 10-K for the year ended April 30, 2012, as well as various Current Reports on Form 8-K), and the final Prospectuses, which would include Forms 10-K, 10-Q, and 8K filed prior to each Offering, were negligently prepared. [*Id.* at ¶ 55]. As a result, the Registration Statement and Prospectuses contained untrue statements of material facts or omitted certain facts, rendering them as misleading. [*Id.*]. The Complaint further alleges that they were not prepared in accordance with the rules and regulations governing the preparation of such documents. [*Id.*]. Plaintiffs maintain that all of Miller Energy's interim and annual financial reports issued between 2010 and 2015, relying upon the Reserve Report, overstated the value of the Alaska Assets by millions of dollars by failing to record the Alaska Assets at fair value as required by Accounting Standards Codification ("ASC") 805, Business Combinations, and federal securities laws. [*Id.* at ¶ 56].

The Complaint states that on April 29, 2015, Miller Energy disclosed that it had received a "Wells Notice" from the SEC, indicating that the agency staff had made a preliminary determination to recommend civil action against Miller Energy related to its accounting for the 2009 acquisition of the Alaska Assets. [*Id.* at ¶ 108]. In September 2015, Miller Energy's Series C and D preferred shares were delisted on the New York Stock Exchange after the market price of each had plummeted to approximately $0.30 per share—a more than 98% decline from the prices

that the shares were marketed at in the Offerings. [*Id.* at ¶ 122]. Subsequently, on October 1, 2015, Miller Energy filed for bankruptcy under Chapter 11, citing in large part, the filing of the SEC action. [*Id.* at ¶ 123]. On March 29, 2016, Miller Energy disclosed on its Form 8-K filed with the SEC that under the bankruptcy plan, all equity interest in Miller Energy was not entitled to any distributions, and therefore, were cancelled. [*Id.* at ¶ 127].

Plaintiffs allege violations of Sections 11, 12(a)(2), and 15 of the Securities Act against the various Defendants. On August 11, 2017, the Chief District Judge dismissed Plaintiffs' Section 11 claim, Section 12 claim, and Section 15 claim predicated on its Section 12 claim against the Individual Defendants. [Doc. 106 at 40]. The Chief District Judge also dismissed Plaintiffs' Section 12 claim against the Underwriter Defendants. [*Id.*]. Plaintiffs' Section 15 claim predicated on its Section 11 claim was allowed to survive against the Individual Defendants as was Plaintiffs' Section 11 claim against the Underwriter Defendants. [*Id.*].

Lead Plaintiffs Kenneth Gaynor, Marcia Goldberg, and Christopher Vorrath have now moved to certify this case as a class action.[3]

II. POSITIONS OF THE PARTIES

Plaintiffs request that the Court certify this matter as a class action pursuant to Federal Rule of Civil Procedure 23. Plaintiffs propose the following definition:

> All persons or entities who purchased or otherwise acquired Miller Energy preferred shares pursuant and/or traceable to all public offerings on February 13, 2013, May 8, 2013, and/or June 28, 2013, Final Prospective Supplements for the 10.75% Series C Cumulative Redeemable Preferred Stoke ("Series C") and/or the public offerings on September 26, 2013, October 17, 2013, and/or August 21, 2014,

[3] The Court observes that the Motion was also filed on behalf of Gabriel Hull. The parties stipulated [Doc. 139] to the voluntary dismissal of Hull's claims, after it was discovered during his deposition that he did not purchase any shares. Specifically, as Defendants pointed out in their Response [Doc. 140 at 30-31], Hull never bought or sold Miller Energy shares but simply traded on behalf of his mother.

> Final Prospective Supplements for the 10.5% Series D Fixed Rate/Flat Cumulative Redeemable Preferred Stock ("Series D") filed with the U.S. Securities and Exchange Commission ("SEC") (collectively, "Offerings") and who were damaged thereby ("Class"). Excluded from the Class are Defendants and their families, the officers and directors and affiliates of Defendants, at all relevant times, members of their immediate family and their legal representatives, heirs, successors, or assigns, and any entity in which Defendants have or had a controlling interest.

[Doc. 131 at 8]. Plaintiffs request that they be appointed lead plaintiffs to serve as class representatives. In addition, they request that Robbins Geller Rudman & Dowd ("Robbins Geller") be appointed as class counsel and that Barrett Johnston Martin & Garrison, LLC, ("Barrett Johnston") be appointed as local class counsel.

In support of their Motion, Plaintiffs assert that the requirements of Rule 23(a) are met in this case. With respect to numerosity, Plaintiffs state that 6.21 million Series C and Series D preferred shares were sold. Plaintiffs submit that while the exact number of persons is unknown, they believe that there are thousands of members of the proposed class who reside throughout the United States.

Further, with respect to whether there are common questions of law or fact, Plaintiffs argue that the main allegations in this case are the same with every putative class member—that is, that Miller Energy overstated its value and that Defendants disseminated substantially the same omissions and misrepresentations regarding Miller Energy's true value. Plaintiffs state that common questions include as follows: (1) whether Defendants violated the Securities Act; (2) whether the Registration Statement and Prospectus Supplements were negligently prepared and contained inaccurate statements of material fact and omitted information required to be stated therein; and (3) to what extent members of the class have sustained damages and the proper measure of damages.

Plaintiffs aver that they have also established that the proposed class representatives' claims are typical of the class. Plaintiffs state that all members acquired the Miller Energy shares pursuant to and/or traceable to the Offerings and were subject to the same set of material mistakes and omissions in the Offerings concerning Miller Energy's financial accounting and reporting of the Alaska Assets. Plaintiffs state that they have standing to pursue claims on behalf of other class members and that they are not subject to unique defenses. Plaintiffs state that it is irrelevant whether they purchased Series C or Series D shares because all shares arose from the same misleading Registration Statement. In any event, however, Plaintiffs state that at least one of them purchased Series C and/or Series D preferred shares.

Plaintiffs maintain that they will fairly and adequately protect the class's interests. Plaintiffs explain that they sustained losses through the same misrepresentations and omissions in the Registration Statement and Prospectus Supplement. They also understand their roles and obligations and will continue to protect the interests of the class. Finally, Plaintiffs state that they have retained adequate counsel.

Furthermore, Plaintiffs assert that they have met the requirements of Rule 23(b)(3) by showing that common questions of law and fact predominate over individual issues and that a class action is the superior method to try this case. Plaintiffs maintain that they only need to establish that Defendants made untrue statements or omissions in the offering documents in violation of Section 11 of the Securities Act. In addition, Plaintiffs assert that varying amounts of damages do not undermine a finding of predominance because damages are awarded pursuant to the statute and can be calculated using a common methodology. Finally, Plaintiffs state that a class action is superior to other available methods for the fair and efficient adjudication of this action.

Defendants respond [Doc. 140] that Plaintiffs cannot establish the predominance requirement pursuant to Rule 23(b)(3) because there are a number of individualized issues in this case. Defendants assert that, for instance, individualized inquires will determine whether each class member is able to trace his/her shares to a particular offering at issue. Defendants argue that it is nearly impossible to determine whether the shares are traceable to these Offerings. Defendants explain that to establish liability as to any of the eighteen Defendants, each class member will have to show that his/her shares can be traced to the Offerings in which each Defendant participated. Defendants state that, here, different groups of underwriters were involved in each of the different offerings. Defendants further provide that the two offerings in 2012 are outside of the statute of repose, which constitutes 69% of the Series C shares that were issued.

Further, Defendants assert that individualized inquiries will determine what knowledge each class member had at the time of his or her purchase. Defendants maintain that there were numerous sources, including a case in this district, that questioned the valuation of the assets. Defendants state that the Chief District Judge has already noted that this fact raises questions about what individual class members knew at the time of his/her purchase. Similarly, Defendants argue that there are individual inquiries regarding whether each class member's claims are barred by the statute of limitations. Defendants state that the one-year statute of limitations for a Section 11 claim commences when the plaintiff had either actual knowledge or inquiry notice. Defendants state that "storm warnings," such as the prior litigation involving similar fraud claims, trigger a duty to investigate and the limitations period begins when a reasonably diligent investigation would have discovered the fraud. In addition, Defendants state that a class may only be certified if there is evidence demonstrating a class-wide method of damages that is consistent with the

theory of liability. Defendants argue that Plaintiffs must submit a damages model, as opposed to simply relying on the statute.

In addition, Defendants assert that the proposed class definition is overbroad. Defendants maintain that the Court has already held that Plaintiffs' Section 11 claim requires loss causation, meaning that Plaintiffs may claim only losses that actually result from the material misstatement at issue and not those that are somehow connected with the misstatement or even those that are simply within the zone of risk of the misstatement. Defendants state that the Court has also ruled that the only corrective disclosure that can establish loss causation is when the SEC initiated enforcement action on August 6, 2015. Defendants assert that Plaintiffs have not limited their proposed class to purchasers who sold their stock after the August 6 corrective disclosure. Defendants state, for instance, Plaintiff Vorrath sold a large amount of Series C Stock in August 2013, two years before the disclosure. Defendants argue that individuals who sold Miller Energy stock before the August 2015 disclosure cannot establish loss causation, as a matter of law, and therefore, cannot show that they suffered any injury tied to the alleged misstatements.

Finally, Defendants assert that neither Plaintiffs, nor their counsel, have shown that they can adequately represent the proposed class. Defendants argue that there is no evidence that Plaintiffs can adequately serve as representatives, which is their burden to demonstrate. Defendants further state that Plaintiffs' deposition testimony establishes their inability to serve as representatives. In addition, Defendants argue that Plaintiffs' counsel cannot adequately conduct the litigation, as evidenced by Gabriel Hull's deposition and the failure to preserve evidence. Defendants argue that during Hull's deposition, counsel discovered that he (Hull) had not purchased any stock and that he only bought or sold stock on behalf of his mother. Defendants add that counsel also failed to adequately ensure that Plaintiffs preserved evidence when Plaintiff

Gaynor changed his mobile phone carrier, causing all previous text messages to be deleted. Defendants state that among the communications that were lost was an exchange with a financial advisor with unique knowledge pertinent to this litigation.

Plaintiffs filed a Reply [Doc. 146], stating that Defendants do not challenge that Plaintiffs have established numerosity, typicality, or commonality with respect to Rule 23(a), nor do Defendants challenge the superiority element of Rule 23(b)(3). Plaintiffs state that Defendants' argument regarding the ability to trace each class member's shares suffers from a number of deficiencies. Plaintiffs maintain that courts nationwide have rejected the argument that the issue of tracing in Section 11 cases precludes class certification. Plaintiffs state that the primary focus is whether the Registration Statement, from which all shares emanated, contained untrue statements or omissions of material fact. Further, Plaintiffs submit that Defendants' tracing argument demonstrates a fundamental misunderstanding of the class action mechanism. Plaintiffs state that the class definition is limited to persons who can trace his or her shares to the Offerings. Plaintiffs assert that each member will be required to submit such proof that he/she is part of the class, which means that he/she bought shares and the purchase is traceable to the enumerated Offerings.

Moreover, Plaintiffs argue that Defendants' participation in different offerings does not defeat predominance or otherwise warrant denial of class certification. Plaintiffs argue that the express language of the statute provides that Defendants are jointly and severally liable to the class. Thus, their participation in different Offerings does not affect the class-wide factual and legal issues. Plaintiffs add that each Defendant participated in issuing either Series C or Series D preferred shares that were tainted by the same misleading information and that each Defendant

could have conducted due diligence to correct the information. Further, Plaintiffs claim that Section 11 provides for the apportionment of damages between co-defendants.

Plaintiffs state that Defendants' affirmative defenses regarding knowledge and the statute of limitations do not defeat predominance. Plaintiffs explain that while Defendants point to various public articles discussing the valuation of the Alaska Assets, this is insufficient to show that certain class members had differing levels of knowledge regarding the misleading nature of the statements or omissions. Further, Plaintiffs emphasize that during this time, Miller Energy denied that the Alaska Assets were overvalued and that Defendants have not cited any non-public information that Plaintiffs had access to in order to confirm that the Alaska Assets were overvalued. Plaintiffs state that courts have held that the statute of limitations defense based on public information does not defeat predominance and that inquiry notice is also conductive to class-wide determination.

With respect to damages, Plaintiffs assert that the statutory methodology for calculating damages under Section 11 satisfies any damages inquiry at the class certification stage. Plaintiffs argue that they have offered a viable, widely accepted, and generally applied methodology for measuring per share damages pursuant to 15 U.S.C. § 77k, of which the application is simple arithmetic. Plaintiffs argue that Defendants fail to cite a single case that held that the statutorily mandated damages calculations under Section 11 preclude class certification.

Furthermore, Plaintiffs state that the proposed class definition is not overbroad and that loss causation arguments are not appropriate at this stage. Plaintiffs argue that there is no requirement under the Securities Act that a purchaser must sell the stock and that Section 11 cases have routinely been certified with materially identical class definitions. Further, Plaintiffs aver

that loss causation is an affirmative defense, and the Supreme Court has held that such arguments are inappropriate at the class certification stage.

Finally, Plaintiffs argue that they have established the requirements pursuant to Rule 23(a)(4). Plaintiffs state that they have demonstrated, through depositions and declarations, their commitment and ability to vigorously prosecute this case. In addition, they state that their counsel is a nationally recognized securities law firm that has been appointed to serve as class counsel on numerous occasions within the Sixth Circuit.

III. STANDARD OF REVIEW

Federal Rule of Civil Procedure 23 governs class actions. In pertinent part, Rule 23 directs that a class may be certified for litigation of claims where:

> (1) the class is so numerous that joinder of all members is impracticable;
>
> (2) there are questions of law or fact common to the class;
>
> (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
>
> (4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a).

Once plaintiffs have satisfied each of the four prerequisites of Rule 23(a), they then must establish that the proposed class action meets at least one of the three categories set forth in Rule 23(b). *In re Nw. Airlines Corp. Antitrust Litig.,* 208 F.R.D. 175, 216 (E.D. Mich. 2002). Here, Plaintiffs move pursuant to Rule 23(b)(3), which provides:

> (1) [Omitted];
>
> (2) [Omitted]; or
>
> (3) the court finds that the 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. The matters pertinent to these findings 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).[4]

In addition to the above requirements, Plaintiffs must show the existence of an ascertainable class. *Avio, Inc. v. Alfoccino, Inc.,* 311 F.R.D. 434, 440 (E.D. Mich. 2015). This means that "the class definition must be sufficiently definite so that it is administratively feasible for the court to determine whether a particular individual is a member of the proposed class." *Young v. Nationwide Mut. Ins. Co.*, 693 F.3d 532, 537-38 (6th Cir. 2012) (quoting 5 James W. Moore et al., Moore's Federal Practice § 23.21[1] (Matthew Bender 3d ed. 1997)). The Sixth Circuit has made clear that the proposed class "must be susceptible of [a] precise definition." *Id.* (other citations omitted).

"The party seeking the class certification bears the burden of proof." *In re Am. Med. Sys., Inc.*, 75 F.3d 1069, 1079 (6th Cir. 1996); *see also Senter v. Gen. Motors Corp.*, 532 F.2d 511, 522 (6th Cir. 1976). Some courts have observed that "suits alleging violations of the securities laws, particularly those brought pursuant to Sections 11 and 12(a)(2), are especially amendable to class

[4] Because Plaintiffs move for class certification pursuant to Rule 23(b)(3), the Court has omitted the other statutory provisions.

action resolution." *Pub. Emp. Ret. Sys. of Miss. v. Merrill Lynch & Co.,* 277 F.R.D. 97, 101 (S.D.N.Y. 2011). Before certifying a class, however, a district court must conduct a "rigorous analysis" into whether the prerequisites of Rule 23 are met. *In re Am. Med. Sys. Inc.*, 75 F.3d at 1078-79 (quoting *Gen. Tel. Co. v. Falcon*, 457 U.S. 147, 162 (1982)). This "rigorous analysis" may well "entail some overlap with the merits of the plaintiff's underlying claims." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 351 (2011). "The district court retains broad discretion in determining whether an action should be certified as a class action, and its decision, based upon the particular facts of the case, [will] not be overturned absent a showing of abuse of discretion." *Sterling v. Velsicol Chem. Corp.*, 855 F.2d 1188, 1197 (6th Cir. 1988).

With the above guidance in mind, the Court will now turn to the facts of the present matter.

IV. ANALYSIS

The Court has reviewed the parties' filings and the arguments presented at the motion hearing. The Court finds that Plaintiffs have satisfied the prerequisites for class certification pursuant to Rule 23(a) and (b)(3). Accordingly, the Court **RECOMMENDS** that the action be certified as a class action.

Defendants maintain that Plaintiffs have not established certain elements of Rule 23(a) and (b)(3).[5] In addition, Defendants argue that the proposed class is overbroad. The Court will begin with Rule 23(a) and then turn to Rule 23(b)(3). Finally, the Court will address Defendants' objections to the class definition.

[5] In Defendants' Response, they request that the Court take judicial notice of SEC filings and news articles. *See* [Doc. 140-3]. The undersigned has taken judicial notice of Defendants' filings as further explained below. *See Bovee v. Coopers & Lybrand CPA*, 272 F.3d 356, 360 (6th Cir. 2001) ("[T]his Court may consider the full text of SEC filings, prospectus, analysts' reports and statements."); *City of Monroe Emp. Ret. Sys. v. Bridgestone Corp.*, 399 F.3d 651, 662 n. 10 (6th Cir. 2005) ("We take judicial notice of the fact that the media articles cited above were published, without reaching any conclusions about their truth.").

A. Rule 23(a)

As mentioned above, pursuant to Rule 23(a), Plaintiffs must establish that the class is so numerous that joinder of all members is impracticable, there are questions of law or fact common to the class, the proposed class representatives' claims are typical of the class, and that Plaintiffs will fairly and adequately protect the interests of the class members.

The Court will address each element separately.

1. Numerosity

Plaintiffs rely on Miller Energy's documents that were filed with the SEC to demonstrate numerosity. Specifically, Plaintiffs state as follows: (1) 625,000 Miller Energy preferred shares were issued pursuant to the February 13, 2013 Series C Offering's Prospectus Supplement; (2) 500,000 Miller Energy preferred shares were issued pursuant to the May 8, 2013 Series C Offering's Prospectus Supplement; (3) 335,000 Miller Energy preferred shares were issued pursuant to the June 28, 2013 Series C Offering's Prospectus Supplement; (4) one million Miller Energy preferred shares were issued pursuant to the September 26, 2013 Series D Offering's Prospectus Supplement; (5) three million Miller Energy preferred shares were issued pursuant to the October 17, 2013 Series D Offering's Prospectus Supplement; and (6) 750,000 Miller Energy preferred shares were issued pursuant to the August 21, 2014 Series D Offering Prospectus Supplement. Plaintiffs contend that the Offerings sold upwards of 6.21 million Series C and Series D preferred shares, which raised over $151.015 million in gross proceeds. Plaintiffs acknowledge that the exact number of persons who acquired Miller Energy shares is unknown, but they believe that the number of members is likely in the thousands, with members residing throughout the United States. Defendants do not respond to Plaintiffs' argument in their brief.

Under section (a)(1) of Rule 23, persons moving for class certification must show that "the class is so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). While there is no strict numerical test, substantial numbers usually satisfy the numerosity requirement. *In re Am. Med. Sys. Inc.*, 75 F.3d at 1079 (citing *Senter*, 532 F.2d at 522). The "exact number of class members need not be pleaded or proved," but "impracticability of joinder must be positively shown, and cannot be speculative." *McGee v. East Ohio Gas Co.*, 200 F.R.D. 382, 389 (S.D. Ohio 2011). "Apart from class size, other case-specific factors that courts should consider in determining whether joinder is impracticable include: the judicial economy, the geographical dispersion of class members, the ease of identifying putative class members, and the practicality with which individual putative class members could sue on their own." *Cannon v. GunnAllen Fin., Inc.,* No. 3:06-0804, 2008 WL 4279858 (M.D. Tenn. Sept. 15, 2008) (citing Alba Conte & Herbert Newberg, 1 Newberg on Class Actions § 3:6 (4th ed. 2003)). "Numerosity is generally assumed to have been met in class action suits involving nationally traded securities." *Burges v. Bancorpsouth, Inc.*, No. 3:14-cv-1564, 2017 WL 2772122, at *2 (M.D. Tenn. June 26, 2017).

As an initial matter, the Court observes that Defendants do not challenge whether Plaintiffs have established numerosity. At the hearing, Defendants represented to the Court that they agreed that numerosity has been satisfied and that based on the definition of the proposed class, they do not object to Plaintiffs' argument regarding numerosity.[6] Accordingly, based on the number of Series C and Series D shares that were purchased (6.21 million), the Court finds that Plaintiffs have established numerosity. *See Beaver Cty. Empl. Ret. Fund v. Tile Shop Holdings,* No. 14-786 ADM/TNL, 2016 WL 4098741, at *3 (D. Minn. July 28, 2016) ("Given that 5.175 million shares

[6] During the hearing, the Court inquired as to whether Defendants' statute of repose argument (i.e., 69% of Series C shares in circulation are barred by the statute of repose) affected Plaintiffs' ability to establish numerosity. Defendants indicated that it did not.

of Tile Shop stock were sold in the December 2012 public offering, joinder of all potential members would be impracticable."); *Schuh v. HCA Holdings, Inc.*, 2014 WL 4716231, No. 3:11-cv-4716231, at *13 (M.D. Tenn. Sept. 22, 2014) (finding numerosity in a case involving "the sale of millions of stock, and [p]laintiff estimate[d] that the number of purchasers [was] likely to be in the thousands and that those purchasers reside[d] in many states.").

2. Commonality

Plaintiffs assert that there are common questions of law and fact for all class members. Plaintiffs state that Defendants made material written misrepresentations and omissions to the investing public in the Registration Statement and Prospectus Supplements filed with the SEC. More specifically, Plaintiffs argue that Miller Energy repeated the overstated value of the Alaska Assets in its periodic financial reports filed with the SEC between 2010 and August 2015. Plaintiffs maintain that Miller Energy publicly defended its valuations and financial reports as being correct and complete following the acquisition of the Alaska Assets. Further, Plaintiffs state that Defendants disseminated substantially the same omissions and misrepresentations concerning Miller Energy's financial accounting and reporting. Defendants do not challenge whether Plaintiffs have established commonality.

As mentioned above, Rule 23(a)(2) requires Plaintiffs to establish that there are "questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). The commonality requirement is "qualitative rather than quantative, that is, there need be only a single issue common to all members of the class." *In re Am. Med. Sys., Inc.*, 75 F.3d at 1080 (quoting Newberg & Alba Conte, Newberg on Class Actions § 3.10 at 3-50 (3d ed. 1992)); *see also Wal-Mart Stores, Inc.*, 564 U.S. at 359 (explaining that under Rule 23(a)(2), a single common issue will suffice).

Here, Plaintiffs contend that Defendants disseminated substantially the same omissions and misrepresentations concerning Miller Energy's over valuation of the Alaska Assets. Plaintiffs state that whether the Registration Statement and Prospectus Supplements were negligently prepared and contained inaccurate statements of material fact and omitted material information required to be stated therein is a common question. Plaintiffs further state that whether such actions violate the Securities Act is a common question of law and fact. Accordingly, and in absence of any objection, the Court agrees that Plaintiffs have identified facts and law that are common to the class.

3. Typicality

Plaintiffs assert that their claims are typical, if not identical to, the claims of other proposed class members. Plaintiffs explain that they and the proposed class members acquired their Miller Energy shares pursuant to and/or traceable to the Offerings and were subject to the same set of material misstatements and omissions in the Offerings concerning Miller Energy's financial accounting and reporting of the Alaska Assets. Plaintiffs argue that the Offerings were materially identical and were all issued pursuant to the same Registration Statement. Plaintiffs maintain that the Offerings expressly incorporated the same SEC filings, thus containing the same material misstatements and omissions. Plaintiffs emphasize that Miller Energy never issued any Series C or Series D stock pursuant to any other registration statement and that the Court previously held that there was no "fundamental change" to the Registration Statement through the Supplemental Prospectuses filed in conjunction with each Offering.

Plaintiffs also contend that they have standing to pursue claims on behalf of the proposed class and are not subject to unique defenses. Plaintiffs argue that it is irrelevant whether they purchased Series C or Series D preferred shares because all of the shares arose from the same

misleading Registration Statement. Plaintiffs state that any one of them could represent the proposed class members, and although not necessary, they have established that at least one of them purchased Series C and/or Series D preferred shares.

In their brief, Defendants do not argue that Plaintiffs failed to establish typicality. At the hearing, however, Defendants asserted that it is impossible to ascertain class members who purchased their shares after 2012. Specifically, Defendants argued that Plaintiff Vorrath admitted that he purchased his shares in pools that were issued pursuant to earlier offerings and that he could not trace his shares back to the specific Offerings in this case. Defendants assert that his inability to trace shares defeats typicality.

"A claim is typical if 'it arises from the same event or practice or course of conduct that gives rise to the claims of other class members, and if his or her claims are based on the same legal theory.'" *Beattie v. Century Tel., Inc.*, 511 F.3d 554, 561 (6th Cir. 2007) (quoting *In re Am. Med. Sys. Inc.*, 75 F.3d at 1082). "A necessary consequence of the typicality requirement is that the representative's interests will be aligned with those of the represented group, and in pursuing his own claims, the named plaintiff will also advance the interest of the class members." *In re Am. Med. Sys. Inc.*, 75 F.3d at 1082. "[F]or the district court to conclude that the typicality requirement is satisfied, "a representative's claims need not always involve the same facts or law, provided there is a common element of fact or law." *Beattie,* 511 F.3d at 561 (quoting *In re Am. Med. Sys., Inc.*, 75 F.3d at 1082).

The Court has considered Defendants' argument raised at the hearing, but the Court finds Plaintiffs have established typicality. As an initial matter, the Court agrees that Plaintiffs must trace their purchases of the tainted securities to the Registration Statement. Here, Plaintiffs have set forth evidence that Plaintiff Goldberg purchased Series D shares directly in the August 21,

2014 offering. [Doc. 132-1]. Because she is a direct purchaser, she may represent all purchasers stemming from the Registration Statement. *See In re Am. Int'l Group, Inc., 2008 Securities Litigation,* 741 F. Supp. 2d 511, 537 (S.D. N.Y. 2010) (explaining that a plaintiff who alleges "untrue statements in the shelf registration statement or the documents incorporated therein . . . has standing to raise claims on behalf of all purchasers from the shelf") (quoting *In re CitiGroup Bond Litig.*, 723 F. Supp. 2d 568, 584 (S.D. N.Y. 2010)); *In re Countrywide Fin. Corp. Sec. Litig.*, 588 F. Supp. 1131, 1164-67 (C.D. Cal. 2008) (stating that an individual has standing to represent prior purchasers "[s]o long as (1) the securities are traceable to the same initial shelf registration and (2) the registration statements share common "parts" that (3) were false and misleading at each effective date, there is § 11 standing"); *see also In re Cobalt Int'l Energy, Inc., Sec. Litig.*, No. H-14-3428, 2017 WL 2608243, at *3 (S.D. Tex. June 15, 2017) (explaining that while defendants argue that plaintiff Universal is not typical because it suffered no damages in connection with the Cobalt Notes, defendants do not assert that plaintiff St. Lucie is asserting claims that are atypical; therefore, "[p]laintiffs have demonstrated that a class representative is asserting claims in connection with the Cobalt Notes that are typical of members of the proposed class"), *appeal docketed*, No. 17-20503, (5th Cir. Aug. 4, 2017).

As mentioned above, Defendants argued at the hearing that Plaintiff Vorrath cannot trace his shares to a specific offering and that he purchased shares pursuant to earlier offerings. Defendants claim he cannot demonstrate his claims are typical of the class. The Court observes that in Plaintiff Vorrath's deposition, he testifies, "I purchased Series C shares between July of 2013 and February of 2015." [Doc. 140-2 at 184]. While he could not identify the specific offering from which he purchased shares, the Court finds that such does not defeat a finding of typicality, given that his interest, as a Series C purchaser, will be aligned with the interests of the other class

members—that is, establishing that the Registration Statement was misleading or omitted certain information. Accordingly, the Court finds that Plaintiffs' claims are typical of the class. *See In re Marsh & McLennan Co., Inc. Sec. Litig.*, No. 04 CIV. 8144 (CM), 2009 WL 5178546, at *10 (S.D.N.Y. Dec. 23, 2009) ("Factual differences involving the date of acquisition, type of securities purchased and manner by which the investor acquired the securities will not destroy typicality if each class member was the victim of the same material misstatements and the same fraudulent course of conduct.").

4. Adequacy

Defendants challenge whether Plaintiffs are able to adequately represent the class members. Defendants emphasize that the record is devoid of evidence establishing Plaintiffs' adequacy to serve as class representatives and that Plaintiffs' conclusory declarations are not sufficient. Specifically, Defendants maintain that Plaintiffs consistently lack any substantive knowledge regarding their own claims and cannot supervise the litigation. Defendants further argue that Plaintiffs are unable to identify the Defendants in this case or Defendants' role in the alleged wrongdoing. Defendants also challenge whether Plaintiffs' counsel is adequate, explaining that counsel did not conduct an adequate investigation of Plaintiffs' purported claims or help to preserve evidence.

Plaintiffs assert that their deposition testimony and signed declarations establish their commitment and ability to vigorously prosecute this litigation. They further contend that their counsel is highly qualified to prosecute this case.

A court may not certify a class unless it finds that the representative parties "fairly and adequately represent the interests of the class." Fed. R. Civ. P. 23(a)(4). The Court considers two criteria for determining whether the representation of the class will be adequate: (1) The

representative must have common interests with unnamed members of the class, and (2) it must appear that the representatives will vigorously prosecute the interests of the class through qualified counsel. *Senter*, 532 F.2d at 525 (citing *Gonzales v. Cassidy*, 474 F.2d 67, 73 (6th Cir. 1973)). "The adequacy of representation requirement 'overlaps with the typicality requirement because a class representative has no incentive to pursue the claims of the other class members absent typical claims.'" *Isabel v. Velsicol*, No. 04-2297 DV, 2006 WL 1745053, at *7 (W.D. Tenn. June 20, 2006) (citing *In re Am Med. Sys., Inc.*, 75 F.3d at 1083).

Defendants do not challenge whether Plaintiffs share common interests with other class members, and for the reasons explained above, *see infra* Part IV.A(2)-(3) ("Commonality and Typicality"), the Court finds that Plaintiffs share common interests with other class members. Defendants challenge, however, whether Plaintiffs will vigorously prosecute this case. Specifically, with respect to Plaintiff Goldberg, Defendants emphasize portions of her testimony that they argue show a marked indifference to the interests of the proposed class. For instance, Defendants highlight the following portions of Plaintiff Goldberg's testimony: (1) the first time she spoke with Attorney Astley was two weeks ago;[7] (2) she had not spoken to anyone else or emailed anyone else from Robbins Geller; (3) she believed she became a class representative two weeks ago when she met with Attorney Astley; (4) she did not understand her role as a class representative or what class certification means; and (5) she testified that she did not look at the complaint when it was filed. [Doc. 140 at 27].

The Court has reviewed Plaintiff Goldberg's deposition testimony and finds that she will adequately represent the interests of the class. Although Defendants have pointed to certain portions of Plaintiff Goldberg's deposition testimony that are somewhat concerning, she later

[7] Plaintiff Goldberg's deposition was taken on January 25, 2018. [Doc. 147-2].

testified as follows: (1) she corresponds with her attorneys via email about once a month; (2) she receives and reviews documents that are filed in the case; (3) she reviewed the complaint filed on November 6, 2015, and authorized its filing; (4) she regularly receives email correspondence from Attorney Trinko; (5) her attorneys keep her abreast of the major developments in this litigation, including the removal of the case to federal court and the rulings on Defendants' motions to dismiss; (6) she is pursuing this claim on behalf of all of the investors; (7) she is prepared to attend court hearings and the trial; (8) she will continue to take an active role and monitor the litigation for the best interests of the class; and (9) she will vigorously pursue the claims against Defendants to obtain the maximum possible recovery. [Doc. 147-2]. While Plaintiff Goldberg could not name the specific Defendants in this case, she agreed that the lawsuit was filed against certain officers and directors and the underwriters. [*Id.* at 11]. She also testified that she reads over the materials as carefully as she can and that she has asked "a lot of questions because [she] did not understand a lot of the wording." [*Id.* at 4]. As a final matter, the Court observes that while this case was filed in 2015, the parties have largely been involved in arguing legal matters before the Court, such as the motion to remand and the motions to dismiss.[8]

Defendants raise similar arguments with respect to Plaintiffs Vorrath and Gaynor, but the Court has reviewed their deposition testimony and finds that they will adequately represent the interests of the class. With respect to Plaintiff Gaynor, he testified as follows: (1) he has reviewed all complaints in this case prior to their filing; (2) he asked to be appointed lead Plaintiff on

[8] Specifically, the Court observes that in February 2017, Defendants sought to dismiss this action, and the Chief District Judge issued a decision in August 2017. *See* 15 U.S.C. § 77z-1 ("In any private action under this subchapter, all discovery and other proceedings shall be stayed during the pendency of any motion to dismiss, unless the court finds, upon the motion of any party, that particularized discovery is necessary to preserve evidence or prevent undue prejudice to that party.").

November 8, 2016; (3) he had discussions with Attorney Trinko about engaging another law firm [Robbins Geller] because of the size of Attorney Trinko's firm; (4) he stays informed about the litigation through telephone calls and emails; (5) he directed his counsel to oppose the removal of this case to federal court; (6) he believes that his role as class representative involves trying to recover the funds that were invested on behalf of himself and all other investors of Series C and Series D preferred shares of Miller Energy; (7) he will attend hearings and the trial; (8) he has performed searches to find relevant documents; and (9) he has reviewed his discovery responses. [Doc. 147-3]. While he testified that he could not name the specific underwriters in this case, he stated, "The underwriters are the ones that make sure that the stock is valued or the information that's with the stock is going to hold ground and that it's a good stock in order to invest in." [*Id.* at 10]. He continued, "I don't believe that they did their job correctly reviewing the stock" and that "I don't believe that they did their due diligence of reviewing the stock itself, the valuation of what it was supposedly valued at." [*Id.* at 12]. The Court finds Plaintiff Gaynor will adequately serve the interests of the class.

Defendants argue that Plaintiff Gaynor is not adequate because he did not preserve evidence. Specifically, Defendants assert that Plaintiff Gaynor changed his mobile-phone carrier, which caused previous text messages to be deleted. Defendants continue that among the communications that were lost were those exchanged with Michael Laderer, a financial advisor, who recommended to Plaintiff Gaynor that he purchase the Series D shares and who later referred him (Plaintiff Gaynor) to Attorney Trinko. The Court has considered Defendants' argument but does not find it warrants a conclusion that Plaintiff Gaynor is inadequate to serve as a lead Plaintiff, especially because it is not clear how these lost communications will be relevant to the instant litigation.

With respect to Plaintiff Vorrath, he testified as follows: (1) he believes that as a representative, he will represent himself and the class and pursue the claims that are filed against Defendants; (2) he reviewed the Complaint prior to it being filed; (3) he believes that the underwriters have a responsibility to accurately assess the value of the shares prior to them being available; (4) that Defendant Underwriters did not perform their due diligence or relied on the information supplied by Miller Energy without verifying such information; and (5) he speaks with Attorney Astley "at times every month, sometimes two or three times in a week," unless they are waiting on a decision. [Doc. 147-4]. When asked whether he provides his counsel recommendations on litigation strategies or whether his counsel keeps him informed, he testified, "I would say it's the latter, that I'm not an attorney. And obviously, I don't have the expertise to give guidance in these matters. I give my input in terms of obviously what the experience that I've had in terms of the people that I've interacted with and what their personal opinions, you know, have been about, what their experiences have been, just to kind of lend an emotion to my personal passion to the situation." [*Id.* at 11]. Based on his deposition testimony, the Court is satisfied that Plaintiff Vorrath is adequate to serve as a lead Plaintiff. Accordingly, the Court finds that all three Plaintiffs will vigorously prosecute the interests of the class.

Defendants also assert that Plaintiffs' counsel, Robbins Geller, cannot adequately conduct the litigation. Specifically, Defendants state that during the deposition of Gabriel Hull, it was revealed that he had never purchased or sold any Miller Energy shares. Defendants submit that this information was only recently discovered, even though this case has been pending for two years.

While the Court finds that this is a significant oversight, the Court declines to find that Robbins Geller or Barrett Johnston are inadequate to serve as lead counsel. The Court has

reviewed their resumes and finds that their firms are qualified to serve as lead and local counsel. [Docs. 132-6, 132-7].

The case that Defendants cite in support of their argument is inapposite from the present matter. *Compare Ballan v. Upjohn Co.*, 159 F.R.D. 473, 489 (W.D. Mich. 1994). In *Ballan*, the court determined that class counsel was inadequate based on a number of deficiencies, including (1) the selection of a phantom plaintiff, (2) a named plaintiff did not purchase the stock during the class period, (3) a named plaintiff was openly solicited by an attorney and the named plaintiff had no further contact with any of the attorneys involved in the case prior to the time he was named as plaintiff in the original and consolidated complaints, (4) two other plaintiffs, the wife and son of class counsel, were named as representatives to hold a place for the law firm to become lead counsel, and (5) a majority of the named plaintiffs either withdrew or were dismissed from the case for failing to comply with discovery. *Id.* at 488-89. Here, the Court does not find that the situation involving Hull warrants a finding that Robbins Geller is inadequate, and the Court observes that shortly after Hull's deposition, the parties agreed that he should be dismissed. *See* [Doc. 139] ("Stipulation of Voluntary Dismissal of Lead Plaintiff Gabriel R. Hull's Claims Against All Defendants"). Defendants also argue that Plaintiffs' counsel did not ensure that Plaintiff Gaynor preserved his text messages. The Court finds this argument unavailing for the same reasons as described above.

Accordingly, the Court finds that Plaintiffs have established the requirements under Rule 26(a). The Court will now turn to the requirements pursuant to Rule 23(b).

B. Rule 23(b) Elements

Plaintiffs must also demonstrate compliance with one of the types of class actions specified in Rule 23(b). Here, Plaintiffs seek to certify the class in accordance with Rule 23(b)(3), which

requires proof that questions of law or fact predominant 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. Accordingly, for the reasons that follow, the Court finds that Plaintiffs have demonstrated both of these criteria.

1. Predominance

Defendants vigorously dispute whether Plaintiffs have established that common issues predominate over individualized inquiries. Specifically, Defendants assert that the following individualized issues defeat class certification: (1) whether each class member can trace his/her shares to a particular offering at issue, (2) what knowledge each class member had at the time of his/her purchase, and (3) whether each class member's claims are barred by the statute of limitations. Defendants also assert that Plaintiffs have not offered any methodology for determining damages on a class-wide basis as required by the Supreme Court.

Plaintiffs submit their Section 11 allegations allow them to file suit against certain enumerated parties when false and misleading information is included in a registration statement. Plaintiffs maintain that they only need to prove that Defendants made untrue statements or omissions in the offering documents. Plaintiffs argue that the primary focus of the class claims is whether the Registration Statement, for which all shares emanated, contained untrue statements or omissions of material fact. Plaintiffs state that Defendants' argument with respect to the ability to trace shares to a particular offering misunderstands the class action mechanism because, by definition, the class is limited to individuals who can trace their shares to the Offerings. Further, Plaintiffs assert that Defendants' participation in the different Offerings does not defeat predominance or otherwise warrant denial of class certification because Section 11 provides that such persons shall be joint and severally liable. Plaintiffs add that Section 11 includes a

mechanism for apportioning damages. In addition, Plaintiffs state that their varying amounts of damages do not preclude class certification because the method of calculating such damages is prescribed per the statute.

"To meet the predominance requirement, a plaintiff must establish that issues subject to generalized proof and applicable to the class as whole predominate over those issues that are subject to only individualized proof." *Young*, at 693 F.3d at 544 (quoting *Randleman v. Fidelity Nat'l Title Ins. Co.*, 646 F.3d 347, 352-53 (6th Cir. 2011)) (other citations omitted). Moreover, "While the commonality element of Rule 23(a)(2) requires showing one question of law or fact common to the class, a Rule 23(b)(3) class must show that common questions will *predominate* over individual issues." *Id.* (Emphasis in original). The Supreme Court has noted, "Predominance is a test readily met in certain cases alleging . . . securities fraud." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625 (1997).

In order to determine whether individual issues predominate, the Court will begin with the elements of the alleged violation. *See Erica P. John Fund, Inc. v. Halliburton*, 563 U.S. 804, 810 (2011) ("Considering whether questions of law or fact common to class members predominate begins, of course, with the elements of the underlying cause of action."). As mentioned above, Chief District Judge Varlan dismissed certain claims but permitted other claims to proceed. *See* [Doc. 106]. The Chief District Judge allowed the Section 11 claim against the Underwriter Defendants and the Section 15 claim based on the Section 11 claim against the Individual Defendants to proceed.[9] Specifically, 15 U.S.C. § 77k(a), in relevant part, provides as follows:

> In case any part of the registration statement, when such part became effective, contained an untrue statement of a material fact or omitted

[9] The parties acknowledge in their briefing that the Section 15 claim is derivative of the Section 11 claim and does not warrant separate consideration. *See* [Docs. 131 at 26 and 140 at 13 n. 1]

> to state a material fact required to be stated therein or necessary to make the statements therein not misleading, any person acquiring such security (unless it is proved that at the time of such acquisition he knew of such untruth or omission) may, either at law or in equity, in any court of competent jurisdiction, sue—
>
> **(1)** every person who signed the registration statement;
>
> **(2)** every person who was a director of (or person performing similar functions) or partner in the issuer at the time of the filing of the part of the registration statement with respect to which his liability is asserted;
>
> **(3)** every person who, with his consent, is named in the registration statement as being or about to become a director, person performing similar functions, or partner;
>
> **(4)** every accountant, engineer, or appraiser, or any person whose profession gives authority to a statement made by him, who has with his consent been named as having prepared or certified any part of the registration statement, or as having prepared or certified any report or valuation which is used in connection with the registration statement, with respect to the statement in such registration statement, report, or valuation, which purports to have been prepared or certified by him;
>
> **(5)** every underwriter with respect to such security.

15 U.S.C. § 77k.

In order to establish relief under Section 11, a plaintiff must show that: (1) he/she purchased a registered security, either directly from the issuer or in the aftermarket following the offering; (2) the defendant participated in the offering in a manner sufficient to give rise to liability under Section 11; and (3) the registration statement contained an untrue statement of a material fact or omitted either a material fact required to be stated therein or a material fact necessary to make the statements therein not misleading. *Local 295/Local 851 IBT Emp'r Grp. Pension Tr. & Welfare Fund v. Fifth Third Bancorp.*, 731 F. Supp. 2d 689, 704 (S.D. Ohio 2010) (citing *In re Morgan Stanley Info. Fund Sec. Lit.*, 592 F.3d 347, 358-59 (2d Cir. 2010)).

As mentioned above, Defendants raise four arguments that they assert defeat certification: (1) inability to trace; (2) knowledge; (3) statute of limitations; and (4) damages. The Court will address these arguments separately.

i. Tracing

At the hearing, the parties agreed that the primary issue with respect to establishing predominance is tracing. Defendants assert that individualized inquiries will determine whether each class member can trace his/her shares to a particular offering issued. They maintain that determining whether shares are traceable to one of the Offerings at issue is nearly impossible for all but direct purchasers. Defendants continue that this inability to trace will bear on two requirements for each class members' Section 11 claim: (1) the liability of each Defendant, and (2) compliance with the three-year statute of repose. Specifically, Defendants submit that aftermarket purchasers cannot trace their shares to an offering involving any particular Defendant. Defendants assert that a different group of underwriters was involved in each of the Offerings at issue and that they can only be liable for the offering that they participated in. Defendants further assert that aftermarket purchasers of Series C shares cannot trace their shares to an offering within the three-year statute of repose. Defendants explain that Series C shares were also offered on September 28 and October 12, 2012, more than three years before this action was filed. Defendants state that each class member would be required to show that he/she purchased a later Offering to establish relief.

Plaintiffs argue that the issue of tracing does not defeat predominance or warrant a denial of class certification. Plaintiffs contend that courts nationwide have rejected the argument that tracing issues in Section 11 cases preclude class certification. Plaintiffs maintain that the primary focus is whether the Registration Statement, from which all shares emanated, contained untrue

statements or omissions of material fact. Plaintiffs emphasize that Defendants' tracing arguments demonstrate a fundamental misunderstanding of the class action mechanism. Plaintiffs explain that the class definition is limited to persons who can trace their shares to the Offerings. Plaintiffs emphasize that their proposed definition requires class members to show that their shares are "pursuant and/or traceable" to the Offerings. Plaintiffs state that the tracing question focuses on membership in the class—a question that exists for every certified class action. Plaintiffs contend that this tracing question can be resolved through a claims administration process, wherein each class member will be required to submit proof that he/she is part of the class.

After reviewing the parties' positions and analyzing the case law, the Court finds individual issues do not predominate. At the heart of Plaintiffs' claim is that the Registration Statement contained misstatements and/or omissions of material fact—the over valuation of the Alaska Assets. This issue will predominant over any secondary issues with respect to tracing. As Plaintiffs emphasized in their brief, a number of courts have explicitly held that the difficulties in tracing do not defeat class certification. *See Freeland v. Iridum World Commc'ns, Ltd.*, 233 F.R.D. 40, 45-46 (D.D.C. 2006) ("[A]ny difficulty by individual class members in tracing their particular aftermarket-purchased shares to the Registration Statement is a secondary issue to be resolved after the predominant issue of Defendant Underwriters' liability has been decided. It would be inappropriate to foreclose such Plaintiffs' resort to the class action format simply because some of their cases may be difficult to prove."); *United Food and Commercial Workers Union v. Chesapeake Energy Corp.*, 281 F.R.D. 641, (W.D. Okla. 2012) ("Difficulties in tracing do not, however, automatically exclude from a class those who obtained their stock through an aftermarket purchase . . . Aftermarket purchasers have standing to pursue their claims if they can prove the securities they purchased were sold in the offering covered by the challenged registration

statement."); *In re Colbalt Int'l Energy, Inc., Sec. Litig.*, 2017 WL 2608243, at *5 ("[T]he requirement that each [p]laintiff must ultimately show that he purchased his shares of Cobalt stock in connection with a public offering does not preclude class certification."); *Beaver Cty. Empl. Ret. Fund*, 2016 WL 4098741, at *13 ("Plaintiffs recognize that tracing is complicated, if not impossible, and that they may ultimately be unable to craft a methodology for determining whether a security purchased in the aftermarket was purchased pursuant to the allegedly defective December 2012 public offering. However, as other courts have noted, tracing is a merits issue that should not be considered at this stage."); *In re Smart Tech., Inc., S'holder Litig.*, 295 F.R.D. 50, 61-62 (S.D. N.Y. 2013) ("But tracing is a merits issue that the court need not consider at the class certification stage."); *In re Direct Gen. Corp. Sec. Litig.*, No. 3:05-cv-0077, 2006 WL 2265472, at *3 (M.D. Tenn. Aug. 8, 2006) ("[F]or purposes of class certification, the common question of whether the registration statements were materially misleading predominates over any secondary tracing issues that might be encountered later in the litigation.").

In making this recommendation, the Court has carefully considered Defendants' argument that tracing issues defeat class certification because there were many different underwriters and officers involved in each of the Offerings. The Court has also considered Defendants' argument that aftermarket purchasers cannot establish that they purchased Series C shares that are not precluded by the statute of repose. The Court agrees that these are concerns with establishing Plaintiffs' case, but the Court does not find that they will predominate over the main issue involving the Registration Statement. It further appears to the Court that Defendants' concerns regarding aftermarket purchasers can be raised through additional dispositive motion practice, so that both parties may develop the factual record. *See generally Beaver*, 2016 WL 4098741, at *13 n. 16 (explaining defendants' "argument that aftermarket purchasers will be unable to trace their

purchases to the [2012 Offering] is an argument best addressed after a factual record has been developed") (citing *In re Dynergy, Inc. Sec. Litig.*, 226 F.R.D. 263, 282 (S.D. Tex. 2005)); *see also In re Cobalt Int'l Energy, Inc. Sec. Litig.*, 2017 WL 2608243, at *7 ("Whether the statue of repose applies to bar absent class members' Section 11 claims is a common question of law applicable to all class members. Application of that legal issue would involve a simple review of purchase documents demonstrating when the purchase occurred."). Accordingly, the Court finds Defendants' arguments not well taken.

ii. Knowledge

Defendants assert that the facts of this case uniquely lend themselves to individualized issues of investor knowledge. Defendants state that during the relevant time period, numerous news articles and publications questioned the valuation of the Alaska Assets. Defendants submit that a class action was filed in 2011 that made nearly identical claims against many of the same Defendants. Defendants maintain that many of the proposed class members purchased shares after this lawsuit was filed and after news articles, relating to Miller Energy's issues, were published. Defendants aver that Plaintiff Vorrath saw various news articles and contacted a representative of Miller Energy due to his concerns.

Plaintiffs argue that knowledge is an affirmative defense and that Defendants have not shown that certain class members had differing levels of knowledge regarding the misleading nature of the statements or omissions.

Section 11 provides an affirmative defense where a defendant can establish that at the time of the purchase, the purchaser new of the untruth or omission. 15 U.S.C. § 77k(a) (providing that purchasers may sue "unless it is proved that at the time of such acquisition he knew of such untruth or omission"). "[T]he fact that a defense may arise and may affect different class members

differently does not compel a finding that individual issues predominate over common ones." *Schuh,* 2014 WL 4716231, at *7 (quoting *Beattie*, 511 F.3d at 564). In order to defeat class certification based on investor knowledge, "defendants must provide evidence that certain class members had differing levels of knowledge regarding the misleading nature of the statements or omissions when they invested sufficient to outweigh common issues." *Id.* (quoting *In re IndyMac Mortgage-Backed Sec. Litig.*, 286 F.R.D. 226, 238 (S.D. N.Y. 2012)). Courts have explained that defendants "must submit evidence showing the existence of individual investor knowledge sufficient to preclude a finding by the Court that 'common liability issues predominate over individual knowledge issues.'" *Id.* (quoting *In re Kosmos Energy Ltd. Sec. Litig.*, 299 F.R.D. 133, 152 (N.D. Tex. 2014)). "This proof need not be at the level required to prove the affirmative defense on the merits but must be adequate to satisfy the court at the certification stage that 'individual knowledge inquiries might be necessary.'" *Id.* (quoting *In re Kosmos Energy Ltd. Sec. Litig.*, 299 F.R.D. at 152-53).

In support of their argument, Defendants rely on publicly available news articles and the testimony of Plaintiff Vorrath, who did his own internet research on potential investments.[10] The Court finds Defendants' affirmative defense of knowledge does not defeat class certification. With respect to the publicly available news articles, the Court finds this insufficient to show that certain class members had differing levels of knowledge regarding the alleged misleading statements or omissions. *See In re IndyMac Mortgage-Backed Sec. Litig.*, 286 F.R.D. at 239 (noting that even if news reports provided some knowledge to investors, such information was "subject to generalized proof"); *N.J. Carpenters Health Fund v. Residential Capital LLC*, No. 08-CV-8781,

[10] Defendants attach the news articles as an exhibit to their Response. [Doc. 140-2]. One article is a letter from Miller Energy's CEO, Scott Boruff, to the shareholders. Defendants, however, only attach portions of the letter. [*Id.* at 79].

2013 WL 6389093, at *4 (S.D. N.Y. Dec. 27, 2013) ("First, publicly available news stories do not create individualized knowledge."). Accordingly, Defendants' argument with respect to the news articles is unavailing.

Further, the Court has reviewed Plaintiff Vorrath's deposition testimony and does not find it warrants denying class certification. Specifically, Plaintiff Vorrath testified that he contacted Miller Energy about the suspension of dividends. [Doc. 147-4 at 6]. He was put in touch with an individual, Derrick Granville, who told him that Miller Energy would make up for any quarter that was missed. [*Id.* at 7]. Plaintiff Vorrath stated that he saw articles in the news, so he talked to Mr. Granville again about his concerns. [*Id.*]. Mr. Granville explained that there was an issue with one of the CEOs or executives of Miller Energy. [*Id.*]. Plaintiff Vorrath testified, "He just went ahead and made a good-faith offering to – obviously his feelings of the fact they're going to resolve these financial issues." [*Id.*]. He later testified that Mr. Granville tried to give him some assurances that Miller Energy's executives were working through the details, they were going to find a resolution, and that the CEO or the CFO had made a good-faith effort to purchase preferred shares. [*Id.* at 9]. Based on this testimony, the Court does not find that Defendants' affirmative defense of knowledge defeats predominance.

iii. Statute of Limitations

Defendants assert that individual inquires will determine whether each class member's claims are barred by the statute of limitations. Defendants explain that the one-year statute of limitations for a Section 11 claim commences when a plaintiff had either actual knowledge or inquiry notice. Defendants contend that "storm warnings," such as prior litigation involving similar fraud claims, trigger a duty to investigate and that the limitations period begins to run only when a reasonably diligent investigation would have discovered the fraud.

Plaintiffs assert that Defendants' argument is simply a rehashing of their knowledge argument above. Plaintiffs state that courts have held that a statute of limitations defense based on public information does not defeat predominance in a Section 11 case. Plaintiffs argue that courts have acknowledged inquiry notice, by definition, is conducive to class-wide determination. Plaintiffs add that Defendants do not provide any case law similar to the instant matter to support their argument.

Section 11 claims are barred if made more than a year after the "discovery of the untrue statement" or "after such discovery should have been made by the exercise of reasonable diligence." 15 U.S.C. § 77m. "[I]nquiry notice arises from notice of facts, which in the exercise of reasonable diligence, would have led to actual knowledge." *Pub. Empl. Ret. Sys. of Miss.,* 280 F.R.D. at 140 (quoting *LC Capital Partners, LP v. Frontier Ins. Grp., Inc.*, 318 F.3d 148, 154 (2d Cir. 2003)) (other citations and quotations omitted). This notice is often referred to as "storm warnings . . . and is assessed objectively under a totality-of-the-circumstances test." *Id.* (other citations and quotations omitted).

For similar reasons as explained above, *see supra* Part IV.B(1)(ii)("Knowledge"), the Court finds that Defendants' affirmative defense does not warrant a finding that individualized issues predominant. Further, as one court explained:

> Additionally, and more fundamentally, inquiry notice is assessed under an objective standard and evaluated under a totality-of-the-circumstances test. It is therefore beyond cavil that resolution of this question can be achieved through generalized proof. If the news reports, government investigations, public hearings, and civil complaints attached as exhibits to Defendants' moving papers were sufficient, either singly or in combination, to place a reasonable investor on inquiry notice of Defendants' alleged securities violations, then the claims of all class members are time-barred. This is the very definition of generalized proof.

Pub. Empl. Ret. Sys. of Miss., 277 F.R.D. at 116 (internal citations and quotations omitted). Accordingly, the Court finds Defendants' arguments not well taken.

iv. Damages

Defendants assert that Plaintiffs have failed to offer any evidence demonstrating compliance with the Supreme Court's decision in *Comcast Corp. v. Behrend*, 569 U.S. 27 (2013). Defendants state that Plaintiffs must present evidence of a class-wide method to award relief that is consistent with Plaintiffs' theory of liability. Plaintiffs argue that *Comcast* did not add a new requirement for establishing predominance and that Section 11 prescribes a methodology to measures damages.

Because both parties cite to *Comcast*, the Court will address the decision. In *Comcast*, the Supreme Court reviewed whether certification was appropriate pursuant to Rule 23(b)(3) with respect to a class of more than two million current and former Comcast subscribers who sought damages. 569 U.S. at 29. Plaintiffs filed a class-action antitrust suit, claiming that Comcast and its subsidiaries engaged in unlawful "swap agreements," wherein Comcast acquired competitor cable providers and swapped their own systems outside the region for competitor systems located in the region (e.g., Comcast obtained Adelphia Communications in the Philadelphia region, along with its subscribers, and Comcast sold Adelphia Communications its systems in Florida and California). *Id.* Plaintiffs alleged that this clustering scheme "harmed subscribers in the Philadelphia cluster by eliminating competition and holding prices for cable services at competitive levels." *Id.* at 30. Plaintiffs relied on four theories of antitrust impact, but the District Court only certified the theory relating to reduced overbuilding competition. *Id.* at 31-32. Plaintiffs' expert calculated a certain amount of damages but acknowledged that his "model did not isolate damages resulting from any one theory of antitrust impact." *Id.*

The Supreme Court held that the class action was improperly certified under Rule 23(b)(3). *Id.* at 34. The Court explained that the Court of Appeals erred when it refused to entertain Comcast's arguments against the damages' model simply because such arguments would also be pertinent to the merits determination. *Id.* The Court explained, "[A] model purporting to serve as evidence of damages in this class action must measure only those damages attributable to that theory. If the model does not even attempt to do that, it cannot possibly establish that damages are susceptible of measurement across the entire class." *Id.* at 35. The Court stated that any model supporting damages must be consistent with liability. *Id.* (citing ABA Section of Antitrust Law, Proving Antitrust Damages: Legal and Economic Issues 57, 62 (2d ed. 2010)).

The Court further explained that the reasoning of the District Court and Court of Appeals was incorrect because they saw no need for plaintiffs to tie each theory of antitrust impact to a calculation of damages because such would involve considerations of the merits. *Id.* The Court observed that this reasoning "flatly contradicts" cases requiring inquiry into the merits of the claim." *Id.* (citing *Wal-Mart*, 564 U.S. at 351). The Court reasoned, "Under that logic, at the class-certification stage *any* method of measurement is acceptable so long as it can be applied class wide, no matter how arbitrary the measurements may be." *Id.* at 36 (Emphasis in original). The Court concluded that there was "no question that the model failed to measure damages resulting from the particular antirust injury on which [plaintiffs'] liability" was premised. *Id.*

Here, Plaintiffs rely on the methodology as prescribed in the statute to assess damages in this case. Specifically, 15 U.S.C. § 77k(e) provides as follows:

> The suit authorized under subsection (a) may be to recover such damages as shall represent the difference between the amount paid for the security (not exceeding the price at which the security was offered to the public) and (1) the value thereof as of the time such suit was brought, or (2) the price at which such security shall have been disposed of in the market before suit, or (3) the price at which

> such security shall have been disposed of after suit but before judgment if such damages shall be less than the damages representing the difference between the amount paid for the security (not exceeding the price at which the security was offered to the public) and the value thereof as of the time such suit was brought: *Provided,* That if the defendant proves that any portion or all of such damages represents other than the depreciation in value of such security resulting from such part of the registration statement, with respect to which his liability is asserted, not being true or omitting to state a material fact required to be stated therein or necessary to make the statements therein not misleading, such portion of or all such damages shall not be recoverable. In no event shall any underwriter (unless such underwriter shall have knowingly received from the issuer for acting as an underwriter some benefit, directly or indirectly, in which all other underwriters similarly situated did not share in proportion to their respective interests in the underwriting) be liable in any suit or as a consequence of suits authorized under subsection (a) for damages in excess of the total price at which the securities underwritten by him and distributed to the public were offered to the public. In any suit under this or any other section of this subchapter the court may, in its discretion, require an undertaking for the payment of the costs of such suit, including reasonable attorney's fees, and if judgment shall be rendered against a party litigant, upon the motion of the other party litigant, such costs may be assessed in favor of such party litigant (whether or not such undertaking has been required) if the court believes the suit or the defense to have been without merit, in an amount sufficient to reimburse him for the reasonable expenses incurred by him, in connection with such suit, such costs to be taxed in the manner usually provided for taxing of costs in the court in which the suit was heard.

Since the ruling in *Comcast*, a number of courts have analyzed the decision in context of securities actions. For instance, in *In re Facebook, Inc., IPO Sec. and Derivative Litig.*, the court explained, "*Comcast* was an antitrust case where the regression model used to calculate damages did not measure damages attributable to the surviving theory of liability." 312 F.R.D. 332, 350 (S.D. N.Y. 2015). The court continued, "*Comcast* does not mandate that certification pursuant to Rule 23(b)(3) requires a finding that damages are capable of measurement on a class wide basis." *Id.* (quoting *Roach v. T.L. Cannon Corp.*, 778 F.3d 401, 402 (2d Cir. 2015)). The court further

stated, "*Comcast* does not bar certification here, where Section 11(e) of the Securities Act provides a statutory formula for damages." *Id.* (citing *N.J. Carpenters Health Fund,* 2013 WL 6839093, at *5). The court concluded, "Because the statutory formula applies, the individual damages questions are sufficiently reduced that predominance of the common questions, answers, and fact remains." *Id.*

Similarly, in *N.J. Carpenters Health Fund*, the Court held, "[S]ection 11(e) of the Securities Act sets out the proper method for calculating damages in this case." 2013 WL 6839093, at *5. The court stated that the analysis in *Comcast* was "inapposite here, where damages reflect liability by statutory formula." *Id.; see also In re Oppenheimer Rochester Funds Group Sec. Litig.*, 318 F.R.D. 435, 447 (D. Col. 2015) (noting that the "calculation of damages is common to the Class as well") (citing 15 U.S.C. § 77k(e)). Accordingly, the undersigned will follow suit and find that Plaintiffs' reliance of the statutory formula provided in 15 U.S.C. § 77k(e) is sufficient.

Accordingly, for the reasons explained above, the Court finds that Plaintiffs have established predominance.

2. Superiority

Plaintiffs assert that Defendants' violations of the federal securities laws caused economic injury to a large number of geographically dispersed investors, making the cost of pursuing individual claims impracticable. Plaintiffs contend that resolving the claims on a class-wide basis will promote judicial economy because the alternative would be to have thousands of separate individual actions. Defendants do not respond to Plaintiffs' argument.

A class action is superior in circumstances "where it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individuals suits for damages, [and thus] aggrieved persons may be without any effective redress unless they may employee the

class-action device." *Young*, 693 F.3d at 545 (quoting *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 339 (1980)). A class action is not the superior method of adjudication if a court must make individual inquiries. *Id.* In situations where class members are unaware of a violation of the law, and thus are unlikely to file individual suits, a class action may be superior to properly vindicate rights. *Id.*

The Court has considered Plaintiffs' arguments and agrees that a class action is the superior method of adjudication. As explained above, 6.21 million shares of Series C and Series D stock were purchased. The vast amount of shares, coupled with the predominate issue in this case, warrant a finding that a class action is the superior method of adjudication. *See United Food and Commercial Workers Union*, 281 F.R.D. at 657 (noting that "class actions have been recognized as a particularly appropriate means of resolving securities actions involving allegations of material misrepresentations or omissions") (citing *Basic, Inc. v. Levinson*, 485 U.S. 224, 250 (1988)). Further, the Court does not foresee any management difficulties in maintaining the class action. *See* Fed. R. Civ. 23(b)(3)(D) (a matter relevant to whether the class action is superior to other methods includes "the likely difficulties in managing a class action"). Accordingly, the Court finds Plaintiffs have established that a class action is the superior method to adjudicate this case.

C. Class Definition

Defendants assert that Plaintiffs' proposed class is overbroad, which they assert precludes class certification. Defendants contend that in Chief Judge Varlan's Order on their motions to dismiss, the Court determined that Plaintiffs' Section 11 claims require loss causation. Defendants explain that the Court further ruled that the only corrective disclosure that could possibly establish loss causation did not occur until August 6, 2015, when the SEC initiated an enforcement action. Defendants argue that Plaintiffs have not limited their proposed class to purchasers who sold their

stock after the disclosure on August 6, 2015. Defendants add that Plaintiff Vorrath sold a large amount of Series C stock in August 2013, two years before the disclosure. Defendants assert that individuals who sold Miller Energy stock before the August 2015 disclosure cannot establish loss causation as a matter of law, and therefore, cannot show that they suffered an injury tied to the alleged misstatements.

Plaintiffs argue that there is no requirement in the Securities Act that a purchaser sell a security to allege a Section 11 claim. Plaintiffs further contend that Section 11 cases have routinely been certified with materially identical class definitions. Plaintiffs explain that loss causation is not an element of a Section 11 claim, but instead, an affirmative defense. Plaintiffs state that Chief Judge Varlan declined to dismiss Plaintiffs' Section 11 claim, stating that the lack of loss causation had not been proven as a matter of law.

The Court finds it inappropriate to limit the class definition at this time, given that, as Plaintiffs argue, there is no requirement in the Securities Act that a purchaser sell a security to allege a Section 11 claim. Further, Defendants' affirmative defense regarding loss causation may be raised in a dispositive motion. *See In re Facebook Inc., IPO Sec. and Derivative Litig.*, 312 F.R.D. at 350 (explaining that loss causation is not an element of any of plaintiffs' claims, causes of the Facebook stock decline were factual questions suitable for resolution on a class-wide basis, and "[w]hether subsequent resolution will be in favor of [d]efendants such that investors who made their purchases on certain dates will be precluded from recovery does not constitute an individualized question."). Accordingly, the Court finds Defendants' arguments not well taken.

V. CONCLUSION

Accordingly, for the reasons set forth above, the Court **RECOMMENDS**[11] that Plaintiffs' Motion for Class Certification [**Doc. 130**] be **GRANTED**. The Court further **RECOMMENDS** that the action be certified as a class pursuant to Rule 23(a) and (b)(3), Plaintiffs Kenneth Gaynor, Marcia Goldberg, and Christopher Vorrath be appointed as Lead Plaintiffs, and that Robbins Geller be appointed as class counsel, along with Barrett Johnston as local counsel.

Respectfully submitted,

Debra C. Poplin
United States Magistrate Judge

[11] Any objections to this Report and Recommendation must be served and filed within fourteen (14) days after service of a copy of this recommended disposition on the objecting party. Fed. R. Civ. P. 72(b)(2). Such objections must conform to the requirements of Federal Rule of Civil Procedure 72(b). Failure to file objections within the time specified waives the right to appeal the District Court's order. *Thomas v. Arn*, 474 U.S. 140, 153-54 (1985). "[T]he district court need not provide *de novo* review where objections [to the Report and Recommendation] are '[f]rivolous, conclusive or general.'" *Mira v. Marshall*, 806 F.2d 636, 637 (6th Cir. 1986) (quoting *Nettles v. Wainwright*, 677 F.2d 404, 410 n.8 (5th Cir.1982)). Only specific objections are reserved for appellate review. *Smith v. Detroit Federation of Teachers*, 829 F.2d 1370, 1373 (6th Cir. 1987).

EXHIBIT 2

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF TENNESSEE

NASHVILLE DIVISION

JACKSON COUNTY EMPLOYEES' RETIREMENT SYSTEM, Individually and on Behalf of All Others Similarly Situated, Plaintiff, vs. CARLOS GHOSN, et al., Defendants.	Civil Action No. 3:18-cv-01368 CLASS ACTION Hon. William L. Campbell, Jr. Magistrate Judge Alistair Newbern ORDER AWARDING ATTORNEYS' FEES AND EXPENSES

This matter having come before the Court on September 19, 2022, on Lead Counsel's motion for an award of attorneys' fees and expenses incurred in this action, the Court, having considered all papers filed and proceedings conducted herein, having found the settlement of this action to be fair, reasonable and adequate, and otherwise being fully informed in the premises and good cause appearing therefore;

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that:

1. All of the capitalized terms used herein shall have the same meanings as set forth in the Stipulation of Settlement dated April 22, 2022 (the "Stipulation"). ECF 241.

2. This Court has jurisdiction over the subject matter of this application and all matters relating thereto, including all Members of the Class who have not timely and validly requested exclusion.

3. The Court hereby awards Lead Counsel attorneys' fees of one-third of the Settlement Amount, and litigation expenses in the amount of $170,067.83, together with the interest earned

thereon for the same time period and at the same rate as that earned on the Settlement Fund until paid. Said fees and expenses shall be allocated amongst counsel in a manner which, in Lead Counsel's good faith judgment, reflects each such counsel's contribution to the institution, prosecution and resolution of the Litigation. The Court finds that the amount of fees awarded is fair and reasonable under the "percentage-of-recovery" method considering, among other things, the following: the highly favorable result achieved for the Class; the contingent nature of Lead Counsel's representation; Lead Counsel's diligent prosecution of the Litigation; the quality of legal services provided by Lead Counsel that produced the Settlement; that the Plaintiffs appointed by the Court to represent the Class supports the requested fee; the reaction of the Class to the fee request; and that the awarded fee is in accord with Sixth Circuit precedent.

4. The awarded attorneys' fees and expenses shall be paid to Lead Counsel immediately after the Court executes the Judgment and this Order is executed subject to the terms, conditions and obligations of the Stipulation and in particular ¶6.2 thereof, which terms, conditions and obligations are incorporated herein.

IT IS SO ORDERED.

DATED: 10/7/2022

THE HONORABLE WILLIAM L. CAMPBELL, JR.
UNITED STATES DISTRICT JUDGE

EXHIBIT 3

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

WILLIAM E. BURGES and ROSE M. BURGES, Individually and on Behalf of All Others Similarly Situated, **Plaintiffs,** **vs.** **BANCORPSOUTH, INC., et al.,** **Defendants.**	**Civil Action No. 3:14-cv-01564** **The Honorable Waverly D. Crenshaw, Jr.** **The Honorable Jeffery S. Frensley** **CLASS ACTION**

ORDER AWARDING ATTORNEYS' FEES AND EXPENSES

This matter having come before the Court on September 21, 2018, on Class Counsel's motion for an award of attorneys' fees and expenses incurred in this action, the Court, having considered all papers filed and proceedings conducted herein, having found the settlement of this action to be fair, reasonable and adequate, and otherwise being fully informed in the premises and good cause appearing therefore;

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that:

1. All of the capitalized terms used herein shall have the same meanings as set forth in the Stipulation of Settlement dated March 30, 2018 (the "Stipulation"). (Doc. No. 245.)

2. This Court has jurisdiction over the subject matter of this application and all matters relating thereto, including all Members of the Class who have not timely and validly requested exclusion.

3. The Court hereby awards Class Counsel attorneys' fees of one-third of the Settlement Amount, and litigation expenses in the total amount of $528,469.01, together with the interest earned thereon for the same time period and at the same rate as that earned on the Settlement Fund until paid. Said fees and expenses shall be allocated amongst counsel in a manner

which, in Class Counsel's good faith judgment, reflects each such counsel's contribution to the institution, prosecution and resolution of the Litigation. The Court finds that the amount of fees awarded is fair and reasonable under the "percentage-of-recovery" method considering, among other things, the following: the highly favorable result achieved for the Class; the contingent nature of Class Counsel's representation; Class Counsel's diligent prosecution of the Litigation; the quality of legal services provided by Class Counsel that produced the Settlement; that the Class Representative appointed by the Court to represent the Class approved the requested fee; the reaction of the Class to the fee request; and that the awarded fee is in accord with legal authority and consistent with other fee awards in cases of this size.

4. The awarded attorneys' fees and expenses shall be paid to Class Counsel immediately after the date this Order is executed subject to the terms, conditions and obligations of the Stipulation and in particular ¶6.2 thereof, which terms, conditions and obligations are incorporated herein.

5. Pursuant to 15 U.S.C. §78u-4(a)(4), Class Representative City of Palm Beach Gardens Firefighters' Pension Fund is awarded $1,235 as payment for its time and expenses representing the Class.

IT IS SO ORDERED.

WAVERLY D. CRENSHAW, JR.
CHIEF UNITED STATES DISTRICT JUDGE

EXHIBIT 4

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

SIDNEY MORSE, et al.	]	
	]	
v.	]	NO. 3:97-0370
	]	Judge Higgins
R. CLAYTON MCWHORTER, et al.	]	

O R D E R

In accordance with the memorandum contemporaneously entered, the plaintiffs' petition for an award of attorney fees and expenses is granted.

Accordingly, the plaintiffs are awarded attorney fees in the amount of $16,500,000, and other expenses in the amount of $849,147.03, for a total award of $17,349,147.03, plus interest at the same rate as that earned by the Settlement Fund until paid.

The court shall retain jurisdiction over this matter with respect to any dispute about the distribution of such fees.

It is so ORDERED.

Thomas A. Higgins

THOMAS A. HIGGINS
United States District Judge

3-12-04

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

IN RE SIRROM CAPITAL CORPORATION SECURITIES LITIGATION,	) C.A. NO. 3-98-0643))) JUDGE CAMPBELL)) MAGISTRATE JUDGE GRIFFIN)

ORDER AND FINAL JUDGMENT

On this 4th day of Feb, 2000, a hearing having been held before this Court to determine: (1) whether the terms and conditions of the Stipulation and Agreement of Settlement, dated Nov 15 1999 (the "Settlement Stipulation") are fair, reasonable and adequate for the settlement of all claims asserted by the Class against the Settling Defendants in the complaint now pending in this Court under the above caption, including the release of the Settling Defendants and the Released Parties and should be approved; (2) whether judgment should be entered dismissing the complaint on the merits and with prejudice in favor of the Defendants and as against all persons or entities who are members of the Class herein who have not requested exclusion therefrom; (3) whether to approve the Plan of Allocation as a fair and reasonable method to allocate the settlement proceeds among the members of the Class; and (4) whether and in what amount to award counsel for plaintiffs and the Class fees and reimbursement of expenses. The Court having considered all matters submitted to it at the hearing and otherwise; and it appearing that a notice of the hearing substantially in the form approved by the Court was mailed to all persons or entities reasonably identifiable, who purchased or otherwise acquired the common stock of Sirrom Capital

Corporation between January 20, 1998 and July 10, 1998, inclusive (the "Class Period"), except those persons or entities excluded from the definition of the Class, as shown by the records of Sirrom's transfer agent, at the respective addresses set forth in such records, and that a summary notice of the hearing substantially in the form approved by the Court was published in The Wall Street Journal pursuant to the specifications of the Court; and the Court having considered and determined the fairness and reasonableness of the award of attorneys' fees and expenses requested; and all capitalized terms used herein having the meanings as set forth and defined in the Settlement Stipulation.

NOW, THEREFORE, IT IS HEREBY ORDERED THAT:

1. The Court has jurisdiction over the subject matter of the Litigation, the Plaintiffs, all Class Members and the Defendants.

2. The Court finds the prerequisites to a class action under Fed. R. Civ. P. 23 (a) and (b)(3) have been satisfied in that: (a) the number of Class Members is so numerous that joinder of all members thereof is impracticable; (b) there are questions of law and fact common to the Class; (c) the claims of the Class Representatives are typical of the claims of the Class they seek to represent; (d) the Class Representatives have and will fairly and adequately represent the interests of the Class; (e) the questions of law and fact common to the members of the Class predominate over any questions affecting only individual members of the Class; and (f) a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

3. Pursuant to Rule 23 of the Federal Rules of Civil Procedure, this Court hereby finally certifies this action as a class action on behalf of all persons who purchased or

otherwise acquired the common stock of Sirrom Capital Corporation between January 20, 1998 and July 10, 1998, inclusive, including all persons or entities that purchased Sirrom common stock pursuant or traceable to the Registration Statement and Prospectus, issued in connection with the Secondary Offering on or about March 5, 1998. Excluded from the Class are the Defendants in this action, members of the immediate families of each of the Defendants, any person, firm, trust, corporation, officer, director or other individual or entity in which any Defendant has a controlling interest or which is related to or affiliated with any of the Defendants, and the legal representatives, heirs, successors in interest or assigns of any such excluded party. Also excluded from the Class are the persons and/or entities who requested exclusion from the Class as listed on Exhibit A annexed hereto.

4. The Settlement Stipulation is approved as fair, reasonable and adequate, and in the best interests of the Class, and the Class Members and the Parties are directed to consummate the Settlement Stipulation in accordance with its terms and provisions.

5. The Complaint is hereby dismissed with prejudice and without costs, except as provided in the Settlement Stipulation, as against any and all of the Defendants.

6. Members of the Class and the successors and assigns of any of them, are hereby forever permanently barred and enjoined from instituting, commencing or prosecuting, either directly or in any other capacity, any and all claims, rights or causes of action or liabilities whatsoever, whether based on federal, state, local, statutory or common law or any other law, rule or regulation, including both known and unknown claims, that have been or could have been asserted in any forum by the Class Members or any of them against any of the Released Parties (defined

below) which arise out of or relate in any way to the allegations, transactions, facts, matters or occurrences, representations or omissions involved, set forth, referred to or that could have been asserted in the Complaint relating to the purchase of shares of the common stock of Sirrom during the Class Period (the "Settled Claims") against any and all of the Defendants, their past or present subsidiaries, parents, successors-in-interest, predecessors, present and former officers, directors, shareholders, agents, insurers, employees, attorneys, advisors, and investment advisors, auditors, accountants and any person, firm, trust, corporation, officer, director or other individual or entity in which any Defendant has a controlling interest or which is related to or affiliated with any of the Defendants, and the legal representatives, heirs, successors in interest or assigns of the Defendants (the "Released Parties"). The Settled Claims are hereby compromised, settled, released, discharged and dismissed as against the Released Parties on the merits and with prejudice by virtue of the proceedings herein and this Order and Final Judgment.

7. The Defendants and the successors and assigns of any of them, are hereby permanently barred and enjoined from instituting, commencing or prosecuting, either directly or in any other capacity, any Settled Defendants' Claims against any of the Plaintiffs, Class Members or their attorneys. The Settled Defendants' Claims are hereby compromised, settled, released, discharged and dismissed on the merits and with prejudice by virtue of the proceedings herein and this Order and Final Judgment.

8. Neither the Settlement Stipulation, nor any of its terms and provisions, nor any of the negotiations or proceedings connected with it, nor any of the documents or statements referred to therein shall be:

(a) offered or received against the Defendants as evidence of or construed as or deemed to be evidence of any presumption, concession, or admission by any of the Defendants of the truth of any fact alleged by Plaintiffs or the validity of any claim that had been or could have been asserted in the Action or in any litigation, or the deficiency of any defense that has been or could have been asserted in the Action or in any litigation, or of any liability, negligence, fault, or wrongdoing of Defendants;

(b) offered or received against the Defendants as evidence of a presumption, concession or admission of any fault, misrepresentation or omission with respect to any statement or written document approved or made by any Defendant, or against the Plaintiffs and the Class as evidence of any infirmity in the claims of Plaintiffs and the Class;

(c) offered or received against the Defendants as evidence of a presumption, concession or admission of any liability, negligence, fault or wrongdoing, or in any way referred to for any other reason as against any of the parties to this Stipulation, in any other civil, criminal or administrative action or proceeding, other than such proceedings as may be necessary to effectuate the provisions of this Stipulation; provided, however, that if this Stipulation is approved by the Court, Defendants may refer to it to effectuate the liability protection granted them hereunder; and

(d) construed against the Defendants or the Plaintiffs and the Class as an admission or concession that the consideration to be given hereunder represents the amount which could be or would have been recovered after trial.

(e) construed as or received in evidence as an admission, concession or presumption against plaintiffs or the Class or any of them that any of their claims are without merit or that damages recoverable under the Consolidated Complaint would not have exceeded the Settlement Fund.

9. The Plan of Allocation is approved as fair and reasonable, and in the best interests of the Class, and Plaintiffs' Counsel and the Claims Administrator are directed to administer the Stipulation in accordance with its terms and provisions.

10. Counsel for plaintiffs and the Class are hereby awarded the sum of $5,000,000.00 in fees, which sum the Court finds to be fair and reasonable, and $122,186.99 in reimbursement of expenses, which shall be paid to the Chair of Plaintiffs' Executive Committee from the Settlement Fund with interest from the date such Settlement Fund was funded to the date of payment at the same rate that the Settlement Amount earns. The award of attorneys' fees shall be allocated among counsel for plaintiffs and the Class in a fashion which, in the opinion of a majority of Plaintiffs' Executive Committee, fairly compensates counsel for the plaintiffs and the Class for their respective contributions in the prosecution of the litigation.

11. Exclusive jurisdiction is hereby retained over the Parties and the Class Members for all matters relating to this litigation, including the administration, interpretation, effectuation or enforcement of the Settlement Stipulation and this Order and Final Judgment, and including any application for fees and expenses incurred in connection with administering and distributing the settlement proceeds to the members of the Class.

12. Without further order of the Court, the Parties may agree to reasonable extensions of time to carry out any of the provisions of the Settlement Stipulation.

13. There is no just reason for delay in the entry of this Order and Final Judgment and immediate entry by the Clerk of the Court is expressly directed pursuant to Rule 54 (b) of the Federal Rules of Civil Procedure.

Dated: Nashville, Tennessee

Feb. 4, 2000

Todd Campbell

UNITED STATES DISTRICT JUDGE