

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

MARCIA GOLDBERG, Individually and) Case No. 2015-CV-33
 on Behalf of All Others Similarly Situated,)

Plaintiff,)

Judge Pemberton

vs.)

DELOY MILLER, et al,)

Defendants.)

Case No. 2015-CV-34

KENNETH GAYNOR, Individually and on)
 Behalf of All Others Similarly Situated,)

Plaintiff,)

Judge Pemberton

vs.)

DELOY MILLER, et al,)

Defendants.)

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)

STATE OF FLORIDA)
) ss.
 COUNTY OF PALM BEACH)

I, STEPHEN R. ASTLEY, being duly sworn, state as follows:

■ I am a partner of the law firm Robbins Geller Rudman & Dowd LLP (“Robbins Geller”). Robbins Geller serves as Lead Counsel on behalf of plaintiffs, Marcia Goldberg, Kenneth A. Gaynor, and Christopher R. Vorrath (collectively, “Plaintiffs”) and the Settlement Class, in this securities class action (the “Litigation”). I submit this affidavit in support of: (i) final approval of the Settlement Plaintiffs reached on behalf of themselves and the Settlement Class with Underwriter Defendants MLV & Co. LLC, National Securities Corporation, Maxim Group, LLC, Aegis Capital Corporation, Northland Capital Markets, Dominick & Dominick, LLC (n/k/a Dominick & Dickerman LLC), Ladenburg Thalmann & Co. Inc., and I-Bankers Securities, Inc. (“Underwriter Defendants”), and Individual Defendants Deloy Miller, Scott M. Boruff, David J. Voyticky, Catherine A. Rector (n/k/a Catherine Rainey), David M. Hall, Merrill A. McPeak, Gerald Hannahs, Charles M. Stivers, Don A. Turkleson, Bob G. Gower, Joseph T. Leary, William B. Richardson, and Marceau N. Schlumberger (“Individual Defendants”) (collectively, “Defendants”); (ii) approval of the proposed plan for the allocation of the Net Settlement Fund (“Plan of Allocation”); and (iii) approval of Lead Counsel’s application for an award of attorneys’ fees and litigation expenses, costs and charges and awards to Plaintiffs (“Fee and Expense Application”).¹ Unless otherwise indicated, I have personal knowledge of the matters set forth herein based both on my extensive participation in the prosecution and settlement of the claims asserted in the Litigation and my supervision of those working at my direction.

¹ Capitalized terms not otherwise defined herein have the meanings given to them in the Stipulation and Agreement of Settlement dated January 6, 2023 (“Stipulation”), filed with the Court on February 22, 2023.

■ The Settlement will resolve all claims asserted in the Litigation against all Defendants on behalf of the Settlement Class, which consists of all persons or entities who purchased or otherwise acquired Miller Energy Resources, Inc.’s (“Miller Energy” or the “Company”) Series C and/or Series D Preferred Stock on or after February 13, 2013, and who were damaged thereby.²

I. PRELIMINARY STATEMENT: THE SIGNIFICANT RECOVERY ACHIEVED

■ Through intensive efforts and after extensive arm’s-length settlement negotiations, Lead Counsel obtained a recovery for the Settlement Class of \$7.6 million, in cash, which has been deposited in an interest-bearing escrow account for the benefit of the Settlement Class. As set forth in the Stipulation, in exchange for this payment, the proposed Settlement resolves all claims asserted in the Litigation by Plaintiffs and the Settlement Class against Defendants.

■ The proposed Settlement was negotiated at arm’s length and reached only after two separate mediations were conducted under the auspices of Michelle Yoshida, Esq. of Phillips ADR Enterprises, P.C., a nationally recognized mediator, and the Honorable Christopher H. Steger, a Magistrate Judge in the Eastern District of Tennessee, as well as additional negotiations amongst counsel while the litigation continued.

² Excluded from the Settlement Class are all Defendants in these actions and their families, the officers and directors and affiliates of Defendants, at all relevant times, members of their immediate families and their legal representatives, heirs, successors or assigns, and any entity in which Defendants have or had a controlling interest. Also excluded from the Settlement Class is bankrupt Miller Energy Resources, Inc. and its successors and assigns, including Glacier Oil & Gas Corporation, Williams Financial Group, and Paul W. Boyd (“Preliminary Approval Order”), ¶2.

■ Before agreeing to the Settlement, Lead Counsel conducted a thorough investigation into the events underlying the claims alleged in the Litigation. In connection with its investigation, Lead Counsel analyzed the evidence adduced from, inter alia: (i) review and analysis of filings Miller Energy made with the U.S. Securities and Exchange Commission (“SEC”); (ii) review and analysis of transcripts of press conferences, conference calls, and industry conferences; (iii) review and analysis of Miller Energy’s corporate website; (iv) review and analysis of securities analyst reports concerning the Company and its operations; (v) review and analysis of certain other documents and materials concerning the Defendants, including pleadings and orders in other actions, news articles, and trade periodicals; (vi) interviews with individuals possessing information concerning the subject matter of the Litigation, including former Miller Energy employees; (vii) documents produced by Defendants and numerous third parties; (viii) documents that pertained to a prior SEC investigation; and (ix) consultations with experts regarding valuation of the Alaska Assets, the due diligence process undertaken by the Defendants while underwriting an offering, and loss causation and damages-related issues.

■ According to analyses prepared by Plaintiffs’ consulting damages expert, the maximum aggregate damages the Settlement Class could have reasonably obtained at trial are approximately \$97.5 million, assuming that liability was proven. As detailed more fully herein, Defendants strenuously maintained, and continue to maintain, that no liability or damages could be proven at trial. The \$7.6 million Settlement represents a gross recovery of 7.8% of maximum estimated damages, which is within the range of reasonableness under the circumstances and warrants final approval of the Settlement. *See, e.g., Medoff v. CVS*

Caremark Corp., 2016 WL 632238, at *6 (D.R.I. Feb. 17, 2016) (approving a 5.33% recovery).

■ As discussed below, Plaintiffs and their counsel obtained this substantial recovery for the Settlement Class despite the significant risks they faced in prosecuting the Litigation, including the bankruptcy of Miller Energy. The settlement amount paid by the remaining Defendants, including the Individual Defendants, when viewed in the context of these risks and uncertainties, makes the Settlement a very favorable result for the Settlement Class.

■ The Settlement has the full support of the Plaintiffs, as detailed in the declarations of Christopher R. Vorrath, Marcia Goldberg, and Kenneth Gaynor, submitted herewith. The Order preliminarily approving the Settlement was signed on March 7, 2023.

II. BRIEF SUMMARY OF PLAINTIFFS' CLAIMS

■ Plaintiffs' claims in the Litigation are pled in the Master Consolidated Complaint filed on January 5, 2017 (the "Master Complaint"). *See Gaynor v. Miller*, No. 3:15-cv-00545-TAV-DCP (E.D. Tenn.), ECF 92. The Master Complaint alleges violations of Sections 11, 12(a)(2), and 15 of the Securities Act of 1933 (the "Securities Act"), against former officers and directors of Miller Energy and the underwriters of the Offerings.³ Plaintiffs' strict liability claims arise from Miller Energy's alleged false and misleading financial accounting and reporting related to the valuation of certain of its oil and gas assets ("Alaska Assets"). Plaintiffs allege that in December 2009, Miller Energy purchased the

³ Miller Energy filed for Chapter 11 bankruptcy protection in late 2015 and was therefore no longer a defendant.

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 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.

■ 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.” Master Complaint, ¶70. 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 SEC, as well as all future filings occurring up until the termination of the Offerings, including the overstated value of the Alaska Assets.

■ Specifically, 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 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.

■ Plaintiffs allege that the Underwriter Defendants are strictly liable for their failure to perform adequate due diligence in connection with their role as underwriters of Miller Energy's Series C and Series D preferred shares offered pursuant to the Form S-3 registration statement filed with the SEC on September 6, 2012 ("Registration Statement"), and six prospectus supplements filed thereafter ("Prospectus Supplements") (collectively, "Offering Documents").

■ Defendants have denied and continue to deny that they committed any act or omission giving rise to any liability and/or violation of law. *See* Stipulation at 8-9. Indeed, Defendants have asserted numerous defenses to liability – disputing every element of Plaintiffs' claims, including falsity, materiality, and the relevance of the SEC settlement to Plaintiffs' allegations.

III. RELEVANT PROCEDURAL HISTORY

■ The Litigation was commenced on November 9, 2015, by the filing of two complaints captioned *Gaynor v. Miller*, No. 2015-CV-34 and *Goldberg v. Miller*, No. 2015-

CV-33, in the Circuit Court for the State of Tennessee, Ninth Judicial District, at Morgan County, against the Underwriter Defendants and Individual Defendants alleging violations of the federal securities laws.

A. Removal to Federal Court

■ 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 (“Federal Court”). *See Gaynor v. Miller*, No. 3:15-cv-00545 (“*Gaynor Action*”), ECF 1; *Goldberg v. Miller*, No. 3:15-cv-00546 (“*Goldberg Action*”), ECF 1.⁴ On January 8, 2016, Gaynor and Goldberg each filed motions to remand which were denied on September 8, 2016, resulting in the continuation of the litigation in federal court. ECF 73.

B. Consolidation and Appointment of Lead Plaintiffs

■ 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.

⁴ All references to “ECF ___” herein refer to the *Gaynor Action* unless otherwise defined.

■ 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 as Local Counsel in the Federal Action. ECF 91.

C. Plaintiffs' Investigation Regarding Defendants' Violations of the Securities Act

■ In accordance with the PSLRA, formal discovery was stayed until the Federal Court ruled on Defendants' motions to dismiss. Nevertheless, prior to and following Plaintiffs' appointment, Lead Counsel directed an extensive investigation of the alleged securities law violations. Lead Counsel's investigation included, *inter alia*, a review of Miller Energy's public statements, analysts' reactions to those statements, and information from a wide range of public and non-public sources.

D. The Master Complaint and Defendants' Motions to Dismiss

20. Based on its investigation, Lead Counsel prepared the Master Complaint on behalf of Miller Energy Series C and Series D preferred shareholders. *See* ECF 92. The Master Complaint was filed on January 5, 2017, and detailed alleged violations of Sections 11, 12(a)(2), and 15 of the Securities Act relating to 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"). The Master Complaint named the Underwriter Defendants and Individual Defendants as defendants and alleged that Defendants made false and/or misleading statements and/or failed to disclose material facts relating to the valuation of the Alaska Assets, including that Miller Energy improperly used the Reserve Report as the only support for fair market value of the Alaska Assets.

21. On February 16 and 21, 2017, the Underwriter Defendants and the Individual Defendants filed separate motions to dismiss the Master Complaint. *See* ECF 95-99. Defendants' motions to dismiss cited a significant number of cases and raised numerous legal challenges. In sum, Defendants argued that: (i) Plaintiffs' Section 11 claims were time barred by the three-year statute of repose and one-year statute of limitation; (ii) Plaintiffs lacked standing to bring a Section 11 claim; (iii) Plaintiffs' Section 11 claims should be dismissed because the Underwriter Defendants relied on the expertise of auditors and engineers; (iv) the Master Complaint failed to allege that the Individual Defendants made statements; (v) Plaintiffs' Section 12 claims should be dismissed because Plaintiffs lack standing; and (vi) Plaintiffs have not and cannot trace their shares to any specific offering. *Id.*

22. In response, Plaintiffs pointed to the myriad allegations pled in the Master Complaint supporting each of the challenged elements. *See* ECF 102-103. For example, Plaintiffs argued that the Master Complaint provides sufficient support of Plaintiffs' standing to pursue their Section 11 and 12(a)(2) claims. Indeed, not only have Plaintiffs adequately alleged that they purchased shares pursuant to the Offerings but they also alleged that the Officer Defendants were statutory sellers. Further, Plaintiffs alleged that neither the statute of limitation nor the statute of repose barred Plaintiffs' claims. In addition, the opposition to the motions to dismiss argued that the Underwriter Defendants failed to prove their reasonable reliance on their affirmative defenses.

23. The Court granted in part, and denied in part, Defendants' motions to dismiss on August 11, 2017. ECF 106. Defendants filed their answers on September 25, 2017, denying all allegations. ECF 111-112.

E. Fact Discovery

24. Following the lifting of the PSLRA automatic discovery stay, the parties exchanged initial disclosures pursuant to Federal Rule of Civil Procedure 26(a). Plaintiffs also promptly propounded detailed discovery requests and third party subpoenas, and ultimately reviewed and analyzed about 1.2 million pages of documents produced by Defendants and 420,000 pages produced from third-parties. Defendants also served discovery on Plaintiffs in connection with class certification.

25. The parties' objections, responses, and answers to one another's discovery requests prompted numerous meet and confer sessions as to the scope and manner of each party's responses, objections, and document production. Through these efforts and over the course of many months of extensive meet and confer sessions and protracted letter-writing on various discovery matters, the parties successfully came to agreement on many issues, including search terms and custodians. The parties' extensive negotiations around the scope of document discovery resulted in numerous compromises that alleviated the need to raise disputes with the Court.

26. To facilitate the cost and time-efficient nature of the document review process, all of the documents were placed in an electronic database, known as Relativity, which was created and maintained at Robbins Geller. The database allowed Lead Counsel to search for and code documents through Boolean-type searches as well as by multiple categories, such

as by author and/or recipient, type of document, date, Bates number, etc. The database also enabled the streamlined ability to cull and organize witness-specific documents in folders for review.

27. Throughout the discovery process, Plaintiffs' Counsel analyzed not only what was produced, but also tracked discovery that potentially was still outstanding. Lead Counsel held numerous meet and confer sessions with Defendants' Counsel and exchanged correspondence with them to ensure the production of all agreed-upon materials.

28. On June 11, 2018, Plaintiffs filed a motion to compel third-party KPMG LLP ("KPMG") to produce documents. *Hull Action*, ECF 155. After months of meet and confers, KPMG refused to produce documents responsive to the document subpoena. The sole issue was the timing of KPMG's production. KPMG refused to produce documents until the motion to remand was decided and it was determined whether the Federal Court had jurisdiction. In response, the Court ordered the parties to meet and confer on the motion. *Hull Action*, ECF 185. With leave of the Court, on January 28, 2020, Plaintiffs filed a renewed motion to compel third-party KPMG to produce documents. *Hull Action*, ECF 199. The motion remained unresolved at the time the Litigation was remanded to state court.

F. Class Certification

29. On January 19, 2018, Plaintiffs filed in the Federal Action their motion for class certification pursuant to Federal Rule of Civil Procedure 23. ECF 131. Plaintiffs also sought an order appointing themselves as Class Representatives and appointing Robbins Geller as class counsel and Barrett Johnston as local class counsel. *Id.*

30. In response, Defendants filed a joint opposition asserting that the proposed class does not meet Rule 23(b)(3)'s predominance requirements because individualized inquiries are required to determine whether each class member can trace his, her, or its shares to a particular offering, their knowledge at the time of the purchase, whether the claims are time barred by the statute of limitations, and because Plaintiffs failed to offer sufficient evidence of damages. ECF 140. Defendants also claimed that the proposed class is overbroad and that neither Plaintiffs nor Lead Counsel could adequately represent the class. *Id.*

31. On February 23, 2018, Plaintiffs filed their reply in support of class certification. ECF 146. Plaintiffs cited to case law wherein courts have routinely rejected the contention Defendants made and have repeatedly held that the common question of whether a registration statement was materially misleading predominates over tracing issues. Miller Energy admitted that the Registration Statement and Prospectus Supplements were materially misleading as evidenced by its agreement to restate its financials dating back to the acquisition of the Alaska Assets more than five years earlier. ECF 146. Further, courts have repeatedly held that a statute of limitations defense based upon public information does not defeat class certification.

32. On June 22, 2018, oral argument was held on Plaintiffs' motion for class certification. On August 6, 2018, Magistrate Judge Poplin issued a report and recommendation fully granting the motion for class certification. ECF 167. The Court did not rule on the report and recommendation prior to the remand detailed below.

G. Remand to State Court

33. On June 1, 2018, pursuant to 28 U.S.C. §1447(c), Plaintiffs filed a renewed motion to remand this Litigation back to the Circuit Court for Morgan County, Ninth Judicial District for the State of Tennessee. ECF 155. The motion to remand was filed after the U.S. Supreme Court issued an opinion unanimously concluding that Securities Act actions such as this one, filed in state court, cannot be removed and that federal courts lack jurisdiction over such claims. *Cyan, Inc. v. Beaver Cty. Emps. Ret. Fund*, 138 S. Ct. 1061, 1078 (2018). Defendants opposed the motion. ECF 159. On December 6, 2019, after the stay for mediation was lifted and litigation resumed, Plaintiffs' renewed motion to remand was granted in full. ECF 185. However, since plaintiff Vorrath's claims originated in the Federal Action, Plaintiffs continued to litigate in the Federal Court for several months until the issue was fully resolved. *Hull* Action, ECF 323.

H. Expert Discovery

34. On February 7, 2020, following the Federal Court's order on remand, Plaintiffs designated three experts and served their expert reports on Defendants. Plaintiffs served an expert report prepared by an underwriting expert who opined that the Underwriter Defendants did not conduct adequate due diligence and the Underwriter Defendants allowed false and misleading disclosures to be made in the Offering Documents.

35. Plaintiffs' second expert, is a valuation expert, who concluded that Miller Energy's recording of the Alaska Assets did not meet fair value measurement as required under accounting standards, the actual recording of the Alaska Assets were overstated on Miller Energy's balance sheet resulting in a non-existent "bargain purchase" under

accounting standards, and that information existed contemporaneously as to the issuance of the various Offerings that should have called into question the validity of the fair value measurement of the Alaska Assets.

36. Finally, as part of their comprehensive investigation of the relevant facts and legal issues, Lead Counsel consulted with in-house financial, economic, and accounting experts and retained the services of a reputable financial economics firm to provide expert analyses on the issues of negative causation and damages. That consultant assisted with the analysis of the losses associated with the share price declines alleged by Plaintiffs. This expert also prepared a damages expert report and further assisted with preparing for settlement negotiations and in developing the Plan of Allocation.

37. At the time of this Settlement, Defendants had not served their expert disclosures.

IV. NEGOTIATION OF THE SETTLEMENT

38. Plaintiffs and the Underwriter Defendants agreed that it would serve their best interest to engage in a formal mediation before a mediator with a track record of mediating complex class action litigation, and an understanding of the law and issues involved in PSLRA actions. The parties agreed to retain Michelle Yoshida of Phillips ADR.

39. Prior to the mediation there were numerous issues about which the parties disagreed, including whether the Registration Statement contained untrue statements of 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.

40. On August 8, 2018, the parties sought to stay all deadlines for mediation. The Court granted the stay shortly thereafter. Plaintiffs and the Underwriter Defendants scheduled their mediation with Ms. Yoshida on September 5, 2018, and Ms. Yoshida instructed the parties to submit and exchange statements prior to mediation detailing their respective positions and supporting evidence. Lead Counsel prepared Plaintiffs' mediation statement, marshaling the facts and documentary evidence obtained through their extensive investigation, including from the documents produced by Defendants and third parties. The parties' respective mediation statements thoroughly set forth Plaintiffs' and Defendants' positions.

41. On September 5, 2018, the parties, through their representatives, participated in a full-day in-person mediation session in New York, New York, overseen by Ms. Yoshida. During the mediation session, Lead Counsel elaborated upon certain facts set forth in the Master Complaint and in Plaintiffs' mediation statement regarding Plaintiffs' claims.

42. After months of continued negotiations, the Court was notified of an impasse on April 9, 2019, and the parties requested the stay be lifted. ECF 181. In response, the Court ordered all parties to mediate in good faith with the Honorable Christopher H. Steger, United States Magistrate Judge. ECF 182. The mediation was held on August 17, 2019, and failed to result in a settlement. On September 11, 2019, Judge Steger notified the Court that a settlement was not obtained. ECF 183.

43. Following remand to state court, negotiations continued and settlements with certain defendants were reached. On August 20, 2021, Plaintiffs filed an unopposed motion for preliminary approval of partial class action settlements seeking approval of four separate

settlements with MLV, National Securities, Maxim, and Aegis Capital. Certain non-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.

44. The parties thereafter memorialized the final terms of settlement in the Stipulation. On February 22, 2023, Plaintiffs filed their Unopposed Motion for Preliminary Approval of Class Action Settlement and supporting memorandum of law, together with the Stipulation, the proposed Plan of Allocation, the Notice of Pendency of Class Action, Proposed Class Action Settlement, and Motion for Attorneys' Fees and Expenses ("Notice"), the Proof of Claim and Release ("Proof of Claim," and, collectively with the Notice, "Notice Package"), the Summary Notice of Pendency of Class Action, Proposed Class Action Settlement, and Motion for Attorneys' Fees and Expenses ("Summary Notice"), and a request that the Court preliminarily certify the Settlement Class for settlement purposes.

45. On February 24, 2023, the Court held a hearing, and on March 8, 2023, this Court entered an order preliminarily approving the Settlement, approving the form and manner of notice to the Settlement Class, and provisionally certifying the Settlement Class for settlement purposes ("Preliminary Approval Order").

46. Pursuant to the Preliminary Approval Order, a Settlement Hearing is scheduled for June 12, 2023. *Id.*

V. RISKS FACED BY PLAINTIFFS IN THE LITIGATION

47. 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 Plaintiffs' 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.

48. If not for this Settlement, the Litigation would have continued to be highly contested by the parties at each significant stage, if the case even proceeded from its current posture. Among other things, document discovery would need to be completed; depositions taken; and expert reports and discovery completed. Motions for class certification and summary judgment also would likely have to be briefed and argued. A trial could take weeks to complete, even without taking into account pre- and post-trial motions, and any favorable ruling to one party would almost certainly be appealed.

49. Moreover, Miller Energy no longer exists as a going concern and has no available assets to satisfy a judgment. Furthermore, there were limited insurance proceeds that would continue to waste with additional litigation, and most of the Defendants have limited assets to satisfy a judgment. Thus, the longer the Litigation continued, the more likely that most, if not all, available assets to satisfy any judgment would have been wasted, if not exhausted, before any verdict or later settlement.

VI. PLAINTIFFS' COMPLIANCE WITH THE COURT'S PRELIMINARY APPROVAL ORDER

50. Pursuant to the Preliminary Approval Order, the Court appointed Gilardi & Co. LLC ("Gilardi") as Claims Administrator in the Litigation and instructed Gilardi to, among

other things, disseminate by mail copies of the Notice Package⁵ and to publish the Summary Notice.

51. The Notice approved by the Court provides potential Settlement Class Members with information about the essential terms of the Settlement and, among other things: (i) their right to exclude themselves from the Settlement Class; (ii) their right to object to any aspect of the Settlement, the Plan of Allocation, or the Fee and Expense Application; and (iii) the manner and deadline for submitting a Proof of Claim in order to be eligible for a payment from the net proceeds of the Settlement. Additionally, the Notice provides the deadlines for objecting to the Settlement or seeking exclusion from the Settlement Class and advises potential Settlement Class Members of the Settlement Hearing scheduled before this Court. The Notice also informs Settlement Class Members of Lead Counsel's intention to apply for an award of attorneys' fees of 33% of the Settlement Amount, plus interest, and for payment of litigation costs and expenses incurred in an amount not to exceed \$850,000, plus interest, and awards to Plaintiffs not to exceed \$15,000 each in connection with their representation of the Settlement Class.

52. On March 21, 2023, Gilardi began mailing Notice Packages to potential Settlement Class Members as well as banks, brokerage firms, and other third-party nominees. *See* Murray Aff., ¶¶5-9. As of May 3, 2023, Gilardi has mailed a total of 14,300 Notice Packages to potential Settlement Class Members and nominees. *Id.*, ¶10.

⁵ The Notice Package is attached as Exhibit A to the Affidavit of Ross D. Murray Regarding Notice Dissemination, Publication, and Requests for Exclusion Received to Date ("Murray Aff."), submitted herewith.

53. On March 28, 2023, Gilardi caused the Summary Notice to be published in *The Wall Street Journal* and to be transmitted over *Business Wire*. *Id.*, ¶11.

54. Gilardi also maintains and posts information regarding the Settlement, as well as downloadable copies of the Notice Package and the Stipulation, among other relevant documents, on a dedicated website for the Litigation, www.MillerEnergySecuritiesLitigation.com, which was established to provide Settlement Class Members with information concerning the Settlement. *Id.*, ¶13. A toll-free telephone number is also available to potential Settlement Class Members for the answers to questions or to request copies of documents. *Id.*, ¶12.

55. Pursuant to the terms of the Preliminary Approval Order, the deadline for Settlement Class Members to submit objections to the Settlement, the Plan of Allocation, or the Fee and Expense Application, or to request exclusion from the Settlement Class is May 23, 2023. Preliminary Approval Order, ¶¶18, 21. To date, Lead Counsel has not received any objections to the Settlement or requests for exclusion from the Settlement Class. Murray Aff., ¶15.

56. Should any objections to the Settlement or requests for exclusion be received, Plaintiffs will address them in their reply papers, which are due on June 5, 2023.

VII. PLAN OF ALLOCATION

57. Pursuant to the Preliminary Approval Order, and as set forth in the Notice, all Settlement Class Members who wish to participate in the distribution of the Settlement proceeds must submit a valid Proof of Claim, including all required information, postmarked (if mailed) or received (if submitted online) on or before June 20, 2023. As provided in the

Notice, after deduction of Court-awarded attorneys' fees and expenses, notice and administration costs, and all applicable taxes, the balance of the Settlement Fund (the "Net Settlement Fund") will be distributed according to the Plan of Allocation. To date, no Settlement Class Member has objected to the Plan of Allocation.

58. The proposed Plan of Allocation, which was set forth and explained in full in the Notice, is designed, to achieve an equitable and rational distribution of the Net Settlement Fund, but it is not a formal damages analysis that would be submitted at trial. Lead Counsel developed the Plan of Allocation in close consultation with Plaintiffs' consulting damages expert and it is based on the statutory formula outlined in Section 11 of the Securities Act for the calculation of damages under that provision. Lead Counsel, therefore, believes that the Plan of Allocation provides a fair and reasonable method to equitably distribute the Net Settlement Fund among Authorized Claimants.

59. The Plan of Allocation provides for distribution of the Net Settlement Fund among Authorized Claimants on a *pro rata* basis based on a "Recognized Loss Amount" calculated for each eligible purchase or acquisition of the Miller Energy Preferred Stock that is listed on the Proof of Claim and for which adequate documentation is provided. If a "Recognized Loss Amount" calculates to a negative number or zero under the established formula set forth in the Notice, that Recognized Loss Amount will be zero. The sum of each Settlement Class Member's "Recognized Loss Amounts" shall be the "Recognized Claim" for each Settlement Class Member.

60. Gilardi, under Lead Counsel's direction, will determine each Authorized Claimant's *pro rata* share of the Net Settlement Fund based upon each Authorized

Claimant's total Recognized Loss compared to the aggregate Recognized Losses of all Authorized Claimants. Calculation of Recognized Loss will depend upon several factors, including when the claimants purchased or acquired Miller Energy Series C and/or Series D preferred shares, and if and when such securities were sold.

61. In sum, the proposed Plan of Allocation, developed in consultation with Plaintiffs' damages expert, was designed to allocate the Net Settlement Fund fairly and rationally among Authorized Claimants. Accordingly, Lead Counsel respectfully submits that the proposed Plan of Allocation is fair, reasonable, and adequate, and should be approved.

VIII. PLAINTIFFS' COUNSEL'S APPLICATION FOR AN AWARD OF ATTORNEYS' FEES AND PAYMENT OF EXPENSES, CHARGES AND COSTS

62. Based on the excellent result obtained for the Settlement Class, and the extensive efforts of Plaintiffs' Counsel required to achieve this result, Plaintiffs' Counsel is applying for compensation from the Settlement Fund on a percentage basis, and requests a fee in the amount of 33% of the Settlement Amount, plus interest. The percentage-of-the-fund method is the appropriate method of compensating counsel in PSLRA class actions 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 in the shortest amount of time under the circumstances. As set forth in the accompanying memorandum (the "Final Approval Brief"), numerous courts have applied the percentage-of-the-fund method in awarding fees and doing so is consistent with the PSLRA. *See* 15 U.S.C. §77z-1(a)(7). The percentage sought is merited in light of the results obtained and the efforts required.

A. The Requested Fee Is Reasonable

63. In light of the nature and extent of the Litigation, their diligent prosecution, the complexity of the factual and legal issues presented, and the other factors described above and in the accompanying application for attorneys' fees and expenses, Plaintiffs' Counsel believe that the requested fee of 33% of the Settlement Amount, plus interest, is fair and reasonable.

64. A 33% fee award is consistent with percentages awarded by courts around the country, and is justified by the specific facts and circumstances in this case and the substantial risks that Plaintiffs' Counsel faced in successfully prosecuting this Litigation. *See, e.g., Cosby v. KPMG LLP*, 2022 WL 4129703, at *2 (E.D. Tenn. July 12, 2022) (finding the requested fee of 33-1/3% "certainly within the range of fees often awarded in common fund cases, both nationwide and in the Sixth Circuit" and "appropriate given the excellent result Co-Lead Counsel achieved notwithstanding substantial risk").

B. The Requested Fee Is Supported by Plaintiffs

65. Plaintiffs actively monitored the Litigation and consulted with counsel during the course of the settlement negotiations. Plaintiffs spent time and effort fulfilling their duties and responsibilities in this case, including preparing for their depositions and providing testimony, answering discovery requests, reviewing documents, producing documents, submitting a declaration in support of class certification, attending the class certification hearing, and consulting with counsel concerning the merits of this Litigation and the Settlement.

66. Plaintiffs' Counsel also request payment of litigation expenses, charges, and costs in connection with the prosecution of the Litigation from the Settlement Fund in the amount of \$657,165.78, plus any accrued interest. The total payment requested for Plaintiffs' Counsel's expenses is below the \$850,000 maximum expense amount that the Settlement Class was advised could be requested.

C. The Requested Fee Is Support by Risks and Unique Complexities of this Litigation

67. As set forth herein, the \$7.6 million cash Settlement was achieved as a result of extensive and creative prosecutorial and investigative efforts, contentious and complicated motions practice, discovery disputes, analysis of voluminous evidence, and assessment and consideration of issues requiring the insight of forensic accountants and experts. This Litigation presented substantial challenges from its outset. The specific risks that were faced in proving Defendants' liability and damages are detailed herein.

68. Plaintiffs' Counsel respectfully submit that any assessment of the proposed fee request should appropriately account for those significant risks. Given that an excellent result was achieved for the Settlement Class in the face of these risks, Plaintiffs' Counsel should be rewarded accordingly. Indeed, without the efforts and skill of Plaintiffs' Counsel, this Settlement would not have been consummated.

69. The foregoing risks are in addition to the more typical risks accompanying securities class action litigation, including that this Litigation was undertaken on a contingent basis.

70. In that regard, Plaintiffs' Counsel understood from the outset that they were embarking on a complex, expensive, and lengthy litigation with no guarantee of being

compensated for the substantial investment of time and money the case would require. In undertaking that responsibility, Plaintiffs' Counsel were obligated to ensure that sufficient resources were dedicated to the prosecution of the Litigation, and that funds were available to compensate staff and to cover the considerable costs that a case such as this requires. With an average lag time of several years for these cases to conclude (this one has been pending since 2015), the financial burden on contingent-fee counsel is far greater than on a firm that is paid on an ongoing basis. Indeed, Plaintiffs' Counsel have received no compensation during the course of the Litigation, but have incurred more than 9,200 hours of time, for a total lodestar of more than \$6.6 million, and have incurred \$657,165.78 in expenses, charges and costs in prosecuting the Litigation for the benefit of the Settlement Class.⁶

71. Plaintiffs' Counsel also bore the risk that no recovery would be achieved (or that a judgment could not be collected, in whole or in part). Even with the most vigorous and competent efforts, success in contingent-fee litigation, such as this, is never assured.

72. Plaintiffs' Counsel know from experience that the commencement of a class action does not guarantee a recovery. To the contrary, it takes hard work and diligence by skilled counsel to develop the facts and theories that are needed to sustain a complaint or win

⁶ See 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 ("Robbins Geller Aff."), Exs. A-E; Affidavit of Curtis V. Trinko Filed on Behalf of the Law Offices of Curtis V. Trinko in Support of Plaintiffs' Application for an Award of Attorneys' Fees and Expenses ("Trinko Aff."), Ex. A; Affidavit of Michael S. Etkin Filed on Behalf of Lowenstein Sandler LLP in Support of Application for Award of Attorneys' Fees and Expenses ("Etkin Aff."), Ex. A; Affidavit of Jerry E. Martin Filed on Behalf of Barrett Johnston Martin & Garrison, PLLC in Support of Application for Award of Attorneys' Fees and Expenses ("Martin Aff."), Exs. A-C. Collectively, the Robbins Geller Aff., the Trinko Aff., the Etkin Aff. and the Martin Aff. are referred to as the "Fee Affs." or the "Fee Affidavits."

at trial, or to convince sophisticated defendants to engage in serious settlement negotiations at meaningful levels.

73. Plaintiffs' Counsel are aware of many hard-fought lawsuits where because of the discovery of facts unknown when the case was commenced or changes in the law during the pendency of the case, or a decision of the court or a jury verdict following a trial on the merits, excellent professional efforts of members of the plaintiffs' bar produced no fee for counsel.

74. Moreover, even if Plaintiffs had successfully opposed a motion for summary judgment, this is not a guarantee that Plaintiffs would have prevailed at trial. Indeed, while only a modest number of securities class actions have been tried before a jury, some have been lost in their entirety. *See, e.g., In re JDS Uniphase Sec. Litig.*, 2007 WL 4788556 (N.D. Cal. Nov. 27, 2007). Additionally, a plaintiff who succeeds at trial still may find its verdict overturned on appeal. *See, e.g., Glickenhau & Co. v. Household Int'l, Inc.*, 787 F.3d 408 (7th Cir. 2015) (major portion of plaintiffs' verdict reversed on appeal); *Anixter v. Home-Stake Prod. Co.*, 77 F.3d 1215, 1219 (10th Cir. 1996) (overturning plaintiffs' jury verdict obtained after two decades of litigation); *Ward v. Succession of Freeman*, 854 F.2d 780 (5th Cir. 1988) (reversing plaintiffs' jury verdict for securities fraud); *Robbins v. Koger Props., Inc.*, 116 F.3d 1441 (11th Cir. 1997) (same). And, even when a plaintiff wins a jury verdict, it still may face substantial challenges in securing a recovery. *See, e.g., In re Bank Atlantic Bancorp, Inc. Sec. Litig.*, 2011 WL 1585605 (S.D. Fla. Apr. 25, 2011), *aff'd sub nom. Hubbard v. Bank Atlantic Bancorp, Inc.*, 688 F.3d 713 (11th Cir. 2012) (granting defendants' post-trial for motion for judgment as a matter of law following jury verdict for plaintiff).

75. Courts have held repeatedly that it is in the public interest to have experienced and able counsel enforce the securities laws and regulations pertaining to the duties of officers and directors of public companies. *See, e.g., Cohn v. Nelson*, 375 F. Supp. 2d 844, 865 (E.D. Mo. 2005) (“The Supreme Court has emphasized that while private actions provide “a most effective weapon in the enforcement” of the securities laws and are “a necessary supplement to [SEC] action,” it is imperative that the filing of contingent class action and derivative lawsuits not be chilled by the failure to award attorneys’ fees or by the imposition of fee awards that fail to adequately compensate counsel for the risks of pursuing such litigation, and the benefits that would not otherwise be achieved.”) (citations omitted). Vigorous private enforcement of the federal securities laws and state corporation laws can occur only if the private plaintiff can obtain some semblance of parity in representation with that available to large corporate interests. If this important policy is to be carried out, courts should award fees that will adequately compensate private plaintiff’s counsel, taking into account the enormous risks undertaken with a clear view of the economics of a securities class action.

76. When counsel undertook to act for the Settlement Class in this matter, we were aware that the only way we would be compensated was to achieve a successful result. The benefits conferred on the members of the Settlement Class by the Settlement are noteworthy in that a common fund worth \$7.6 million (plus interest) was obtained for the Settlement Class despite the existence of substantial risks (including a bankrupt corporate defendant) and Defendants’ zealous and vigorous defense.

77. Here, diligent efforts by counsel in the face of substantial risks and uncertainties have resulted in a significant and immediate recovery for the benefit of the Settlement Class. In circumstances such as these, and in consideration of the substantial effort expended and the very favorable result achieved, the requested fee of 33% of the Settlement Fund and payment of \$657,165.78 in expenses, charges and costs is reasonable and should be approved.

D. A Lodestar Cross-Check Supports the Requested Award of Attorneys' Fees

78. A lodestar cross-check supports the requested attorneys' fees. A lodestar cross-check is performed by multiplying the number of hours expended in the litigation by the hourly rates of the attorneys. While a lodestar cross-check is often a useful tool in determining the reasonability of a fee request, whether or not to perform one is within the Court's discretion.⁷

79. As more fully set forth above, the Litigation settled only after Lead Counsel conducted a comprehensive investigation into the Settlement Class' claims; researched and prepared two separate motions to remand; researched and prepared the detailed Master Complaint; fully briefed Defendants' motions to dismiss; filed and defended Plaintiffs' motion for class certification in the Federal Action; filed a motion to compel against third-party KPMG; reviewed documents produced by Defendants and numerous third parties;

⁷ Additional work will be required of Plaintiffs' Counsel on an ongoing basis, including: preparation for, and participation in, the final approval hearing; responding to any objections; supervising the claims administration process being conducted by the Claims Administrator (including responding to inquiries from Settlement Class Members); and supervising the distribution of the Net Settlement Fund to Settlement Class Members who have submitted valid Proofs of Claim. Plaintiffs' Counsel will *not* seek payment for this work.

prepared thorough mediation materials; designated experts and issued three expert reports; and engaged in an arm's-length mediation process. At all times throughout the pendency of the Litigation, Lead Counsel's efforts were driven and focused on advancing the Litigation to bring about the most successful outcome for the Settlement Class, whether through settlement or trial, by the most efficient means necessary.

80. Here, Plaintiffs' Counsel have expended over 9,200 hours in the prosecution and investigation of the Litigation. *See* Robbins Geller Aff., Ex. A; Trinko Aff., Ex. A; Etkin Aff., Ex. A; Martin Aff., Ex. A. The lodestar calculates the time spent by the attorneys and other professionals employed by counsel, compiled from contemporaneous daily time records regularly prepared and maintained by counsel, multiplied by the hourly rate for each timekeeper.

81. The 2022 hourly billing rates of Lead Counsel in this Litigation range from \$1,105 for members/partners and senior counsel and \$675 for associate attorneys. *See* Robbins Geller Aff., Ex. A. Although Robbins Geller does not assert that hourly clients regularly pay these rates, the foregoing hourly rates were submitted to and approved by courts around the country. *See* Robbins Geller Aff., ¶4.

82. The resulting lodestar is \$6,667,883.25. Pursuant to a lodestar "cross-check," the requested fee of 33% of the Settlement Fund (which equates to \$2,508,000) results in a negative "multiplier" of 0.37 on the lodestar, which does not include any time that will necessarily be spent obtaining approval of and thereafter administering the Settlement.

E. Standing and Expertise of Plaintiffs' Counsel

83. Robbins Geller is highly experienced in complex securities class actions and has successfully prosecuted numerous securities class action suits throughout the country. *See Robbins Geller Aff., Ex. F.* As detailed therein, Robbins Geller has been approved by courts to serve as lead counsel in scores of securities class actions throughout the United States. Moreover, the firm has served as lead counsel in numerous high-profile matters which, during the last several years alone, have recovered billions of dollars for investors.

F. Request for Litigation Expenses, Costs and Charges

84. Plaintiffs' Counsel also seek payment from the Settlement Fund of \$657,165.78 in litigation expenses, charges and costs reasonably and necessarily incurred by them in connection with commencing and prosecuting the claims against Defendants.

85. From the beginning of the case, Plaintiffs' Counsel were aware that they might not recover any of their expenses, and, at the very least, would not recover anything until the Litigation was successfully resolved. Thus, counsel was motivated to, and did, take steps to minimize expenses whenever practicable without jeopardizing the vigorous and efficient prosecution of the case. The expenses, charges and costs for which Plaintiffs' Counsel seek payment are the types of expenses that are necessarily incurred in litigation and routinely charged to litigants who are billed by the hour. These expenses include, among others, travel costs, computer-based research, and mediator and expert fees.

86. The Fee Affidavits summarize by category expenses, charges and costs incurred by Plaintiffs' Counsel in connection with the prosecution of this Litigation. These expenses, charges and costs are reflected on the books and records maintained by Lead

Counsel. These books and records are prepared from expense vouchers, check records, and other source materials, and are an accurate record of the expenses incurred.

87. All of the litigation expenses, charges and costs incurred by Plaintiffs' Counsel, which total \$657,165.78, were necessary to the successful prosecution and resolution of the claims against Defendants.

G. The Reaction of the Settlement Class to the Fee and Expense Application

88. Consistent with the Preliminary Approval Order, as of May 3, 2023, 14,300 Notice Packages have been mailed to potential Settlement Class Members and nominees. *See Murray Aff.*, ¶10. The Notice stated that Lead Counsel would seek an award of attorneys' fees equal to 33% of the Settlement Amount, plus interest, and payment of expenses, charges and costs in an amount not greater than \$850,000, plus interest. Additionally, the Summary Notice was published in *The Wall Street Journal* and transmitted over *Business Wire*. *Id.*, ¶11. The Notice also has been available on the Settlement website maintained by Gilardi. *Id.*, ¶13.

89. While the deadline set by the Court for Settlement Class Members to object to the requested fees and expenses, charges and costs has not yet passed, to date Lead Counsel has not received any, and there have been no objections to the requested fee, no objections to the requested expenses, and no objections to the Settlement itself. Lead Counsel will respond to any objections received by the May 23, 2023 deadline in the reply papers, which are due on June 5, 2023.

IX. CONCLUSION

90. In view of the certain and meaningful recovery to the Settlement Class and the substantial risks of continued litigation, as described above and in the accompanying memorandum of law, Plaintiffs and their counsel respectfully submit that the Settlement should be approved as fair, reasonable, and adequate, and that the proposed Plan of Allocation should likewise be approved as fair, reasonable, and adequate. In view of the significant recovery achieved in the face of substantial risks, the quality of work performed, the contingent nature of the fee, and the standing and experience of Plaintiffs' Counsel, as described above and in the accompanying memorandum of law, Plaintiffs' Counsel respectfully request that the Court award attorneys' fees in the amount of 33% of the Settlement Amount, plus expenses, charges and costs in the amount of \$657,165.78, plus the interest earned thereon. In addition, Plaintiffs should be reimbursed for their time and expenses directly related to their representation of the Settlement Class as set forth in their respective declarations.

I state under penalty of perjury under the laws of the State of Florida that the foregoing is true and correct. Executed this 9th day of May, 2023, at Boca Raton, Florida.

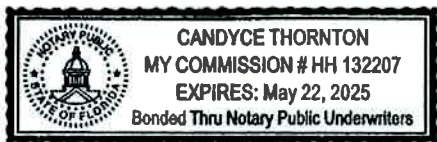


STEPHEN R. ASTLEY

A Notary Public or other officer completing this certificate verifies only the identity of the individual who signed the document to which this certificate is attached, and not the truthfulness, accuracy, or validity of that document.

State of Florida)
) ss:
County of Palm Beach)

Subscribed and sworn to (or affirmed) before me on this 9th day of May, 2023, by Stephen R. Astley, proved to me on the basis of satisfactory evidence to be the person who appeared before me.





Notary Public, State of Florida

Commission expires: May 22, 2025

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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