UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

IN RE FRONTIER COMMUNICATIONS CORPORATION STOCKHOLDERS LITIGATION	No. 3:17-cv-01617-VAB

MEMORANDUM OF LAW IN SUPPORT OF
LEAD PLAINTIFFS' MOTION FOR FINAL APPROVAL
OF CLASS ACTION SETTLEMENT AND PLAN OF ALLOCATION

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In accordance with Fed. R. Civ. P. 23(e), Lead Plaintiffs Arkansas Teacher Retirement System ("ATRS") and Carlos Lagomarsino (collectively, "Lead Plaintiffs"), on behalf of themselves and the Settlement Class, respectfully submit this memorandum of law in support of their motion for final approval of the proposed settlement of this Action (the "Settlement") and the proposed plan of allocation of the net proceeds of the Settlement (the "Plan of Allocation").[1]

PRELIMINARY STATEMENT

Subject to Court approval, Lead Plaintiffs have agreed to settle all claims in this Action in exchange for a cash payment of $15,500,000, which Defendants have caused to be deposited into an escrow account. Lead Plaintiffs respectfully submit that the proposed Settlement is fair, reasonable, and adequate; satisfies all the standards for final approval under Rule 23 of the Federal Rules of Civil Procedure; and should be finally approved by the Court.

Lead Plaintiffs believe that the proposed Settlement is in the best interest of the Settlement Class, considering the range of possible outcomes of the litigation, including the significant risk that there might be no recovery at all. At the time the Parties agreed in principle to settle the Action, Lead Plaintiffs' appeal of the Court's March 24, 2020 order denying Lead Plaintiffs' motion for leave to amend the Complaint and dismissing the case with prejudice (the "Appeal") was pending before the United States Court of Appeals for the Second Circuit (the "Second Circuit"). There was a significant risk that the Appeal would be unsuccessful, in which case the Settlement Class would obtain no recovery at all without the Settlement.

[1] Unless otherwise noted, all emphasis is added, all citations are omitted, and capitalized terms have the meanings given them in the Stipulation and Agreement of Settlement dated December 23, 2021 (ECF No. 192-2) (the "Stipulation"), or in the Declaration of Katherine M. Sinderson in Support of (A) Lead Plaintiffs' Motion for Final Approval of Class Action Settlement and Plan of Allocation and (B) Lead Counsel's Motion for Attorneys' Fees and Litigation Expenses (the "Sinderson Declaration" or "Sinderson Decl."), filed herewith. Citations herein to "¶ __" and "Ex.__" refer, respectively, to paragraphs in, and exhibits to the Sinderson Declaration.

Moreover, even if the Appeal succeeded, Lead Plaintiffs and the Settlement Class would face additional, substantial hurdles before any recovery, including the need to establish liability and damages by Defendants. Had Lead Plaintiffs succeeded at appeal, Lead Plaintiffs' claims would likely concern a handful of alleged false and misleading statements made by Defendants that fewer than 1% of the millions of customers acquired by Frontier in April 2016 from Verizon Communications Inc. (the "CTF Acquisition") suffered outages following the acquisition (the "1% Statements"). Defendants vigorously argued, and would have continued to argue, that the challenged 1% Statements were not false or misleading when made, that Defendants did not have any intent to mislead investors, and that the corrective disclosures alleged by Lead Plaintiffs did not reveal the truth of the alleged misstatement to the market. Thus, even assuming Lead Plaintiffs' success on the Appeal, the Parties faced the prospect of protracted litigation, including a renewed motion to dismiss, fact and exert discovery, summary judgment, a complex trial, post-trial motions on both liability and damages, and the inevitable additional appeals.

Finally, even in the event Lead Plaintiffs overcame all these significant risks—any one of which could have resulted in substantially less or even ***no*** recovery for investors—Lead Plaintiffs would face serious constraints in their ability to actually collect any judgment, given Frontier's bankruptcy reorganization. Defendants' already-limited resources available to pay any judgment would certainly have diminished significantly following likely years of continued litigation.

Thus, the Settlement avoids these significant risks and indefinite delays while providing a meaningful, certain, and immediate $15.5 million benefit to the Settlement Class.

As detailed in the Sinderson Declaration,[2] the Settlement is the product of Lead Plaintiffs' substantial litigation effort. This effort started with Lead Plaintiffs' extensive investigation of the alleged fraud through the review of public information such as filings with the SEC, analyst reports, conference call transcripts, and news articles. Lead Plaintiffs also reviewed thousands of pages of documents obtained from requests for government records to regulators around the country. Lead Plaintiffs located and interviewed 124 former Frontier employees regarding the events at issue. Using this substantial trove of information, Lead Plaintiffs prepared a detailed consolidated complaint (the "Complaint"). They then opposed Defendants' extensive motion to dismiss the Complaint, including through submitting opposition briefing and in oral argument before the Court. After the Court dismissed the Complaint but allowed Lead Plaintiffs leave to move to amend, Lead Plaintiffs then re-opened their investigation into the alleged fraud, contacting dozens more former Frontier employees and consulting further with an expert on market efficiency and class-wide damages. After drafting a detailed proposed amended complaint (the "PAC"), Lead Plaintiffs thereafter filed a motion to amend and submitted extensive briefing and reply briefing in support of that motion. After the Court's denial of Lead Plaintiffs' motion for leave to amend, Lead Plaintiffs appealed to the Second Circuit seeking review of the Court's order denying the motion for leave to amend. As such, when the Settlement was reached, Lead Plaintiffs and Lead Counsel possessed a thorough and well-developed understanding of the strengths and weaknesses of the case.

[2] The Sinderson Declaration is an integral part of this submission and, for the sake of brevity in this memorandum, the Court is respectfully referred to it for a detailed description of, among other things: the history of the Action (¶¶7-60); the nature of the claims asserted (¶¶16-17); the negotiations leading to the Settlement (¶¶51-58); the risks and uncertainties of continued litigation (¶¶62-82); and the terms of the Plan of Allocation for the Settlement proceeds (¶¶95-102).

The Settlement is also the result of months-long negotiations between experienced counsel. In early May 2021, counsel for the Parties began to discuss the possibility of resolving the Action and engaged in numerous arm's-length negotiations concerning the merits of the case, the risks of litigation, and the amount of recoverable damages. As a result of those extensive, arm's-length negotiations, the Parties reached an agreement-in-principle to settle the Action on September 30, 2021, which was memorialized in a term sheet executed on November 3, 2021. Following additional negotiations regarding the specific terms of their agreement, on December 23, 2021, the Parties executed the Stipulation, which reflects the final and binding agreement between the Parties on the terms and conditions of the Settlement.

On January 18, 2022, the Court preliminarily approved the Settlement, finding it likely that the Court could approve the Settlement at final approval. Preliminary Approval Order, ¶4. The Settlement has the full support of Lead Plaintiffs—who are both experienced and sophisticated investors (*see* Exs. 1 & 2)—and the reaction of the Settlement Class to date has been positive. While the deadline for objections has not yet passed, following the dissemination of more than 700,000 Notices to potential Settlement Class Members and nominees as well as publication of a Summary Notice online and in high-circulation media, there have been no formal objections to date. *See* Ewashko Decl. (Ex. 3), ¶118. Accordingly, and as further discussed below, Lead Plaintiffs respectfully submit that the Settlement is fair, reasonable, and adequate, and merits final approval by the Court.

Additionally, Lead Plaintiffs request that the Court approve the Plan of Allocation, which is set forth in the Notice. The Plan of Allocation, which Lead Counsel developed in consultation with Lead Plaintiffs' damages expert, provides a reasonable method for allocating the Net

Settlement Fund among Settlement Class Members who submit valid claims based on damages they suffered on their transactions in Frontier Securities during the Class Period.

ARGUMENT

I. THE PROPOSED SETTLEMENT MERITS FINAL APPROVAL

Federal Rule of Civil Procedure 23(e) requires judicial approval for any compromise or settlement of class-action claims. *See* Fed. R. Civ. P. 23(e). A class-action settlement merits approval where the court finds it "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2); *See also Menkes v. Stolt-Nielsen S.A.*, 2011 WL 13234815, at *2 (D. Conn. Jan. 25, 2011). Further, the Second Circuit has recognized that public policy favors settlement, particularly in class actions. *See Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 116 (2d Cir. 2005) ("We are mindful of the 'strong judicial policy in favor of settlements, particularly in the class action context.'"). In ruling on final approval of a class settlement, a court should examine both the negotiating process leading to the settlement and the settlement's substantive terms. *Id*.; *In re Citigroup Inc. Sec. Litig.*, 2014 WL 2112136, at *2-3 (S.D.N.Y. May 20, 2014).

Rule 23(e)(2) provides that courts should determine whether a proposed settlement is "fair, reasonable, and adequate" after considering whether:

> (A) the class representatives and class counsel have adequately represented the class; (B) the proposal was negotiated at arm's length; (C) the relief provided for the class is adequate, taking into account: (i) the costs, risks, and delay of trial and appeal; (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims; (iii) the terms of any proposed award of attorney's fees, including timing of payment; and (iv) any agreement required to be identified under Rule 23(e)(3); and (D) the proposal treats class members equitably relative to each other.

Fed. R. Civ. P. 23(e)(2). In addition, the Second Circuit has historically held that courts should consider following factors from *City of Detroit v. Grinnell Corp*. in evaluating class settlements:

> (1) the complexity, expense and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings and the amount of discovery completed; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining the class action through the trial; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery; [and] (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.

495 F.2d 448, 463 (2d Cir. 1974), *abrogated on other grounds by Goldberger v. Integrated Res., Inc.*, 209 F.3d 43 (2d Cir. 2000). *See also* Fed. R. Civ. P. 23's advisory committee notes to 2018 amendments (noting that the four factors in Rule 23(e)(2) are not intended to "displace" any factor previously adopted by a Court of Appeals, but "rather [seek] to focus the court and the lawyers on the core concerns of procedure and substance that should guide the decision whether to approve the proposal"). Accordingly, and consistent with the practice of courts in this Circuit, Lead Plaintiffs will discuss the Settlement's "fairness, reasonableness, and adequacy" principally under the four factors listed in Rule 23(e)(2), while also discussing relevant and non-duplicative *Grinnell* factors. *See, e.g.*, *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 330 F.R.D. 11, 29 (E.D.N.Y. 2019) (noting that "the new Rule 23(e) factors to add to, rather than displace, the *Grinnell* factors"). As discussed below, these factors strongly support approval here.

A. Lead Plaintiffs and Lead Counsel Have Adequately Represented the Settlement Class

In weighing approval, a court should consider whether "the class representatives and class counsel have adequately represented the class." Fed. R. Civ. P. 23(e)(2)(A); *see also In re Barrick Gold Sec. Litig.*, 314 F.R.D. 91, 99 (S.D.N.Y. 2016) ("the adequacy requirement 'entails inquiry as to whether: (1) plaintiffs' interests are antagonistic to the interest of other members of the class and (2) plaintiffs' attorneys are qualified, experienced and able to conduct the litigation'").

Here, there is no antagonism or conflict between Lead Plaintiffs and the proposed class. Lead Plaintiffs, like the other Settlement Class Members, purchased Frontier Securities during the Class Period, and they were all injured by the same alleged misstatements. If Lead Plaintiffs were to prove their claims at trial, they would also prove the Settlement Class's claims. *See Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 568 U.S. 455, 460 (2013) (the investor class "will prevail or fail in unison" because claims are based on common misrepresentations and omissions).

Lead Counsel also notes that it is well qualified and highly experienced in securities litigation (*see* Sinderson Decl. Ex. 4A-3), and Lead Plaintiffs and Lead Counsel respectfully submit that they vigorously represented the Settlement Class both by prosecuting the Action for over four years against highly regarded opposing counsel before finally negotiating a favorable $15.5 million recovery for the Settlement Class through the Settlement. ¶¶7-58. Accordingly, Lead Plaintiffs and Lead Counsel have adequately represented the Settlement Class.

B. The Settlement Was Reached After Arm's-Length Negotiations Among Experienced Counsel

The Court should also consider whether the settlement "was negotiated at arm's length." Fed. R. Civ. P. 23(e)(2)(B). Courts have traditionally considered other related circumstances in determining the "procedural" fairness of a settlement, including: (i) counsel's understanding of the strengths and weakness of the case based on factors such as "the stage of the proceedings and the amount of discovery completed," *Grinnell*, 495 F.2d at 462-63, and (ii) the "absence of any indication of collusion" in the settlement negotiations, *Weinberger v. Kendrick*, 698 F.2d 61, 74 (2d Cir. 1982). These circumstances support the approval of the Settlement here, as the Settlement was reached only after months of arm's-length negotiations.

Beginning in early May 2021, while Lead Plaintiffs' Appeal of the Court's Order denying the motion to amend the Complaint was pending, the Parties explored the possibility of resolving

the litigation through settlement. Counsel for the Parties thereafter participated in numerous arm's-length negotiations concerning the merits of the case, the risks of litigation, and the amount of recoverable damages. As a result of those extensive, arm's-length negotiations, the Parties reached an agreement-in-principle to settle the Action for $15,500,000 in cash. ¶¶51-58. The fact that the Parties reached the Settlement after arm's-length negotiations between experienced counsel creates a presumption of its fairness. *See Woburn Ret. Sys. v. Salix Pharms., Ltd.*, 2017 WL 3579892, at *2 (S.D.N.Y. Aug. 18, 2017) ("'presumption of fairness, adequacy, and reasonableness' will apply" where "settlement is achieved through arm's-length negotiations, between experienced and capable counsel"). *See also, e.g.*, *Stolt-Nielsen*, 2011 WL 13234815 at *2; *In re Top Tankers, Inc. Sec. Litig.*, 2008 WL 2944620, at *3 (S.D.N.Y. Jul. 31, 2008); *In re Advanced Battery Techs., Inc. Sec. Litig.*, 298 F.R.D. 171, 175 (S.D.N.Y. 2014).

Moreover, the Parties and their counsel were well informed about the strengths and weaknesses of the case before they agreed to settle. Here, for example, Lead Plaintiffs and Lead Counsel conducted a thorough pre-filing investigation by, *inter alia*, reviewing hundreds of SEC filings, analyst reports, investor call transcripts, Company press releases, news articles, and documents obtained from regulators through requests for government records. ¶13. They also identified, located, and interviewed 124 former Frontier employees regarding the events and claims at issue. ¶¶3, 14. In addition, Lead Plaintiffs and Lead Counsel consulted extensively with an expert on market efficiency and class-wide damages—in addition to all the other work they did to analyze and understand the relevant law and facts as part of their comprehensive briefing of the numerous issues raised in the Defendants' motion to dismiss, Lead Plaintiffs' motion to amend, and Lead Plaintiffs' Appeal to the Second Circuit. ¶¶15, 18-50. Accordingly, when the Parties reached their agreement to settle the Action, Lead Plaintiffs and Lead Counsel had sufficient

information to evaluate their case and the adequacy of the proposed Settlement. *See In re Global Crossing Sec. & ERISA Litig.,* 225 F.R.D. 436, at 458 (S.D.N.Y. 2004) ("[F]ormal discovery is not a prerequisite; the question is whether the parties had adequate information about their claims."); *In re Austrian & German Bank Holocaust Litig.,* 80 F. Supp. 2d 164, 176-77 (S.D.N.Y. 2000) (not necessary for court to find parties engaged in extensive discovery; must merely find that they engaged in sufficient investigation to enable court to make intelligent appraisal of case) (citing *Plummer v. Chem. Bank*, 668 F.2d 654 (2d Cir. 1982)); *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 459 (9th Cir. 2000) (even absent extensive formal discovery, class counsel's significant investigation and research supported approval).

Further, Lead Plaintiffs themselves strongly support the Settlement, further weighing in favor of approval. ATRS—an experienced, sophisticated institutional investor that has achieved numerous securities class action recoveries under the PSLRA, and Mr. Lagomarsino, an experienced private equity investor who suffered a substantial loss on his investments in Frontier Communications Corporation common stock—have endorsed the Settlement. *See* Declaration of Rod Graves, submitted on behalf of ATRS (Ex. 1) at ¶¶2, 8, and Declaration of Carlos Lagomarsino (Ex. 2) at ¶¶2, 6. A settlement reached "under the supervision and with the endorsement of a sophisticated institutional investor is . . . 'entitled to an even greater presumption of reasonableness.'" *In re Veeco Instruments Inc. Sec. Litig.*, 2007 WL 4115809, at *5 (S.D.N.Y. Nov. 7, 2007). Likewise, the informed judgment of Lead Counsel, which is highly experienced in securities litigation (*see* Sinderson Decl. ¶112), is entitled to "great weight." *Shapiro v. JPMorgan Chase & Co.*, 2014 WL 1224666, at *2 (S.D.N.Y. Mar. 24, 2014); *accord In re NASDAQ Market-Makers Antitrust Litig.*, 187 F.R.D. 465, 474 (S.D.N.Y. 1998) (courts consistently give "'great

weight' . . . to the recommendations of counsel, who are most closely acquainted with the facts of the underlying litigation"). Lead Counsel here strongly endorses the Settlement.

C. The Proposed Settlement Is Fair, Reasonable, and Adequate In Light of the Costs and Risks of Further Litigation and Similar Factors

In determining whether a class action settlement is "fair, reasonable, and adequate," the Court must also consider whether "the relief provided for the class is adequate, taking into account . . . the costs, risks, and delay of trial and appeal" and similarly relevant factors. Fed. R. Civ. P. 23(e)(2)(C). In most cases, this will be the most important factor in analyzing a proposed settlement. *See Grinnell*, 495 F.2d at 455 ("most important factor" is "strength of the case for plaintiffs on the merits, balanced against the amount offered in settlement.").[3]

As a threshold matter, courts "have long recognized that [securities class action] litigation is notably difficult and notoriously uncertain." *In re Flag Telecom Holdings, Ltd. Sec. Litig.*, 2010 WL 4537550, at *15 (S.D.N.Y. Nov. 8, 2010); *see also In re Sturm, Ruger, & Co. Sec. Litig.*, 2012 WL 3589610, at *5 (D. Conn. Aug. 20, 2012) ("In evaluating the settlement of a securities class action, federal courts ... have long recognized that such litigation is notably difficult and notoriously uncertain."). Accordingly, such suits "readily lend themselves to compromise because of the difficulties of proof, the uncertainties of the outcome, and the typical length of the litigation." *In re Luxottica Grp. S.p.A. Sec. Litig.*, 233 F.R.D. 306, 310 (E.D.N.Y. 2006). This case was no exception.

[3] Indeed, this factor under Rule 23(e)(2)(C) essentially encompasses at least six of the nine factors of the traditional *Grinnell* analysis. *See Grinnell*, 495 F.2d at 463 ("(1) the complexity, expense and likely duration of the litigation; . . . (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining the class action through the trial; . . . (8) the range of reasonableness of the settlement fund in light of the best possible recovery; [and] (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation").

Absent the Settlement, Lead Plaintiffs faced the continued prosecution of the Appeal; then, even ***if*** Lead Plaintiffs succeeded on the Appeal, Lead Plaintiffs still would have likely faced full briefing on Defendants' renewed motion to dismiss the Complaint, and—if successful in opposing that motion—the continued litigation of the Action would have also required the Parties to undertake expensive and time-consuming fact and expert discovery, including the exchange of document requests, interrogatories, and requests for admission; the production and review of a voluminous number of documents; numerous fact and expert depositions; and the designation of experts and exchange of expert reports. Additionally, a motion for summary judgment by Defendants would likely have to be briefed and argued, as would *Daubert* challenges to expert testimony. Even assuming Lead Plaintiffs successfully overcame these challenges, trial on Lead Plaintiffs' claims would likely take weeks to complete, even without taking into account pre- and post-trial motions. Lead Plaintiffs faced these numerous and significant risks, which necessarily involved substantial costs and delays, all without any assurance of obtaining a better (or indeed any) recovery. ¶¶62-82. Given the meaningful litigation risks, and the immediacy and amount of the $15,500,000 recovery, Lead Plaintiffs and Lead Counsel believe that the Settlement is fair, reasonable, and adequate, and is in the best interest of the Settlement Class. ¶86.

1. The Risks of Establishing Liability and Damages Support Approval of the Settlement

While Lead Plaintiffs believe that their claims are meritorious, they recognize that this Action presented several substantial risks to establishing both liability and damages. Indeed, the risks inherent to this case are illustrated by the Court's initial dismissal of the entire Action and its subsequent denial of Lead Plaintiffs' motion to amend the Complaint. Even if Lead Plaintiffs succeeded on Appeal, the Action would be significantly narrowed compared to Lead Plaintiffs' original pleading. In the Complaint, Lead Plaintiffs had alleged multiple categories of statements

concerning the CTF Acquisition as against multiple Defendants under both the Exchange and Securities Acts. However, after the Court's decisions on Defendants' motion to dismiss and Lead Plaintiffs' motion to amend, only one category of statement remained viable—the 1% Statements—and as against only Frontier and a single remaining executive Defendant, Frontier's former CEO Daniel McCarthy. Therefore, the risks of continued litigated were dramatically heightened, and the ultimate potential for recovery for the Settlement Class was greatly reduced.

(a) Risks To Proving Liability

Even if Lead Plaintiffs had prevailed on their Appeal before the Second Circuit, they would have faced significant risks in proving Defendants' liability on remand. Following a remand to this Court, Defendants would have undoubtedly filed a renewed motion to dismiss the Complaint, and Lead Plaintiffs would have face significant risks in overcoming a second round of motion to dismiss briefing before this Court. Further, even if Lead Plaintiffs had prevailed on a renewed motion to dismiss, they would have faced significant risks in convincing the Court or a jury of Defendants' ultimate liability. Among other things, Lead Plaintiffs faced challenges in proving that Defendants' statements were materially false and misleading when made.

Significantly, though several state government entities investigated Frontier following the CTF Acquisition, neither the SEC nor any other governmental entity brought a formal investigation or asserted a parallel enforcement action concerning the claims asserted in this Action. ¶72. Furthermore, while Frontier did file for bankruptcy protection, the Company has never formally restated its financial statements nor otherwise admitted the falsity of any statements. Rather, Defendants have continuously asserted that their statements were accurate, and likely would continue to vigorously contend as such at summary judgment, at trial, and on appeal. *Id*. Moreover, Defendants argued—and likely would continue to argue—that Lead Plaintiffs failed to adequately establish that the 1% Statements were false. *Id*. Although the Court agreed with Lead

Plaintiffs that the PAC adequately alleged the falsity of the 1% Statements at the pleading stage, there is no guarantee that a jury would agree. *Id*.

Finally, even if Lead Plaintiffs were able to prove that Defendants' statements were false or misleading, they would ***still*** need to prove that Defendants acted with the intent to mislead investors or with deliberate recklessness, which Defendants would likely vigorously dispute. ¶73. Among other things, Defendants would likely point to their absence of insider stock sales as evidence of a lack of intent, and they would continue to argue that the compensation they did receive for completion of the CTF Acquisition incentivized them to complete the acquisition successfully—not to commit fraud on investors. *Id*.

(b) Risks Concerning Class Certification, Loss Causation, and Damages

Lead Plaintiffs also faced substantial risks to establishing loss causation, to successfully certifying a class, and to proving damages. If Lead Plaintiffs' Appeal succeeded, and the Court credited Defendants' arguments on loss causation, class certification, damages, or a combination of these issues, the Settlement Class's potential recovery would have been significantly reduced or even eliminated entirely.

First, Lead Plaintiffs faced the real possibility that the Second Circuit would agree with this Court's findings at the motion to amend stage with respect to loss causation and dismiss the case entirely. The Court had already dismissed Lead Plaintiffs' claims on loss causation grounds on two occasions—including even after finding that falsity and scienter for the 1% Statements were otherwise adequately alleged—on the basis that the corrective disclosures alleged in the Complaint did not, in fact, reveal the truth about the 1% Statements and cause investors' losses. ¶75. While Lead Plaintiffs vigorously argued otherwise on appeal, absent a settlement, there was a risk that the Second Circuit would agree with this Court and investors would recover nothing.

Second, Lead Plaintiffs faced the risk that, even if the Second Circuit vacated this Court's decision, this Court may ultimately have found, in ruling on a renewed motion to dismiss, that the Complaint did not adequately plead loss causation for one or more of the alleged corrective events. If the Court had dismissed one or more of the PAC's alleged corrective events, investors' potential recovery would be even further diminished.

Third, while the Settlement Class has been preliminarily certified by the Court for settlement purposes, without the Settlement Lead Plaintiffs faced the risk that a contested motion for class certification would not be granted. Moreover, even if a class were certified over Defendants' objections, it would face multiple risks in proving the class-wide nature of Defendants' securities-laws violations at trial. Indeed, were a class to be certified, Defendants could petition for immediate interlocutory appeal pursuant to Rule 23(f), and a class certification order may be "altered or amended before final judgment" under Rule 23(c). Thus, maintaining certification is an expensive and risky enterprise. *See, e.g.*, *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 347-66 (2011) (reversing certification order that was obtained in 2004 and affirmed by a Ninth Circuit panel in 2007 and *en banc* in 2009); *In re Priceline.com, Inc. Sec. Litig.*, 2007 WL 2115592, at *3 (D. Conn. July 20, 2007) (finding that there was a risk of maintaining class certification through trial, although the court had already certified the class, since the prospects of decertification existed in light of defendants' vigorous opposition to plaintiffs' class-certification motions, amongst other reasons).

Finally, the resolution of damages and loss causation likely would have boiled down to a "battle of experts," and Defendants would undoubtedly have presented a well-qualified expert who would opine that the class's damages were smaller or nonexistent. There is no way to predict with any degree of certainty which expert's opinions the jury would have accepted. Had the jury

accepted some or all of Defendants' expert's views, damages would been materially reduced, and potentially eliminated altogether. The Settlement eliminates those risks and provides a certain recovery for the Settlement Class. *See In re Facebook Inc. IPO & Sec. Litig.*, 2015 WL 6971424, at *5 (S.D.N.Y. Nov. 9, 2015) ("[D]amages would be subject to a battle of the experts, with the possibility that a jury could be swayed by experts for Defendants, who could minimize or eliminate the amount [of] Plaintiffs' losses. Under such circumstances, a settlement is generally favored over continued litigation."); *Veeco*, 2007 WL 4115809, at *9 ("a very lengthy and complex battle of the parties' experts likely would have ensued at trial, with unpredictable results. These risks as to liability strongly militate in favor of the Settlement."); *Priceline.com*, 2007 WL 2115592, at *3-4 (risks of proving liability supported settlement, where plaintiffs' securities claims would be challenged at summary judgment and face obstacles in proving damages, which would entail a battle of the experts).

(c) Risks To Ability To Pay

Even if Lead Plaintiffs overcame all the significant risks detailed above—any one of which could have resulted in substantially less or even no recovery for investors—Lead Plaintiffs would face substantial barriers in collecting any judgment considering Frontier's bankruptcy reorganization and the limited resources available for Defendants.

* * *

In sum, Lead Plaintiffs faced substantial risks to proving the issues of liability, loss causation, and damages. And, of course, even if Lead Plaintiffs prevailed at summary judgment and trial, Defendants would likely have filed post-trial motions and appeals, thereby likely leading to additional years of litigation. *See, e.g.*, *Robbins v. Koger Props., Inc.*, 116 F.3d 1441, 1448-49 (11th Cir. 1997) (jury verdict of $81 million for plaintiffs against accounting firm reversed on

appeal on causation grounds, and judgment entered for defendant). The presence of such risks further weighs strongly in favor of approving the Settlement.

2. The Settlement Is Also Fair and Reasonable in Light of Realistically Recoverable Damages

Lead Plaintiffs submit that the $15.5 million Settlement is also a favorable result when considered in relation to the maximum damages that could realistically be established at trial. Lead Plaintiffs' damages expert has estimated that ***maximum*** potential damages in this case are approximately $885 million. Sinderson Decl. ¶84. However, this estimated amount assumes Lead Plaintiffs' complete success in establishing Defendants' liability and the other elements of Lead Plaintiffs' claims, and further that Lead Plaintiffs managed to keep in the case all ***four*** of the Complaint's alleged corrective events against Defendants' likely repeated challenges on a renewed motion to dismiss, class certification, summary judgment, and before a jury.

In reality, Lead Plaintiffs faced the more likely possibility that the Court or jury would narrow the case to include only the November 1, 2016 corrective disclosure. Under this more likely scenario, Lead Plaintiffs' damages expert has estimated that the maximum total damages for the stock that Lead Plaintiffs could realistically establish at trial, assuming complete success, would be $220 million. In that circumstance, the $15.5 million Settlement represents a recovery of approximately 7% of the realistic recoverable damages, which would represent a strong result in the face of this Action's significant litigation risk. *See Sturm, Ruger, & Co.*, 2012 WL 3589610, at *7 (approving settlement that represented approximately 3.5% of estimated damages, which exceeded the average recovery in shareholder litigation); *In re Canadian Superior Sec. Litig.*, 2011 WL 5830110, at *2 (S.D.N.Y. Nov. 16, 2011) (approving settlement representing 8.5% of maximum damages, which court noted "exceed[s] the average recovery in shareholder litigation"); *In re China Sunergy Sec. Litig.*, 2011 WL 1899715, at *5 (S.D.N.Y. May 13, 2011) ("average

settlement amounts in securities fraud class actions where investors sustained losses over the past decade . . . have ranged from 3% to 7% of the class members' estimated losses"); *In re Merrill Lynch & Co. Rsch. Reports Sec. Litig.*, 2007 WL 313474, at *10 (S.D.N.Y. Feb. 1, 2007) (approving recovery of 6.25%, which was "at the higher end of the range of reasonableness").

3. The Costs and Delays of Continued Litigation Support Approval of the Settlement

As noted above, the time and costs involved in continuing to litigate through a successful resolution of the Appeal, full briefing of Defendants' renewed motion to dismiss the Complaint, the completion of fact and discovery (including depositions), and summary judgment—let alone through a trial and the inevitable post-trial motions and appeals—would still have been ***very*** substantial. Indeed, it is widely recognized that "[s]ecurities class actions are generally complex and expensive to prosecute." *In re Gilat Satellite Networks*, *Ltd*., 2007 WL 1191048, at *10 (E.D.N.Y. Apr. 19, 2007). Accordingly, this factor also weighs in favor of approval.

4. All Other Rule 23(e)(2)(C) Factors Also Support Approval

Rule 23(e)(2)(C) also instructs courts to consider whether the relief provided for the class is adequate in light of "the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;" "the terms of any proposed award of attorney's fees, including timing of payment;" and "any agreement required to be identified under Rule 23(e)(3)." Fed. R. Civ. P. 23(e)(2)(C)(ii)-(iv). These factors also support final approval.

First, the procedures for processing Settlement Class Members' claims and distributing the Settlement's proceeds to eligible claimants in cases of this type are well-established. In sum, the net Settlement proceeds will be distributed to eligible Settlement Class Members who submit required Claim Forms and supporting documentation to the Court-appointed Claims Administrator, A.B. Data, Ltd. ("A.B. Data")—a highly experienced claims administration firm.

A.B. Data will (a) review and process submitted Claims under the supervision of Lead Counsel, (b) provide Claimants with an opportunity to cure any deficiencies and bring any unresolved Claims disputes to the Court, and (c) ultimately send claimants their *pro rata* share of the Net Settlement Fund (following entry of a final "Class Distribution Order" by the Court).[4] This type of claims processing is standard in securities class actions (as neither Lead Plaintiffs nor Frontier possess individual investors' trading data that would otherwise allow the Parties to create a "claims-free" process to distribute Settlement funds).

Second, the relief provided by the Settlement remains adequate upon consideration of the terms of the proposed award of attorneys' fees. As discussed in the accompanying Fee Memorandum, the requested attorneys' fees of 25% of the Settlement Fund, to be paid only upon the Court's approval, are fair and reasonable. Of particular note, the approval of attorneys' fee awards is entirely separate from the approval of the Settlement, and neither Lead Plaintiffs nor Lead Counsel may terminate the Settlement based on this Court's or any appellate court's ruling with respect to attorneys' fees. *See* Stipulation, ¶17.

Lastly, as previously disclosed, the only agreement the Parties entered into in addition to the initial Term Sheet and the Stipulation was a confidential Supplemental Agreement regarding requests for exclusion. *See* Stipulation, ¶37. The Supplemental Agreement provides Defendants with the option to terminate the Settlement in the event Settlement Class Members who timely and validly request exclusion from the Settlement Class meet certain conditions. *Id*. This type of agreement is standard in securities class actions and has no negative impact on the fairness of the Settlement. *See, e.g., Hefler v. Wells Fargo & Co.*, 2018 WL 4207245, at *11 (N.D. Cal. Sept. 4.

[4] The Settlement is not a claims-made settlement. If the Settlement is approved, Defendants will have no right to the return of any portion of Settlement based on the number or amount of Claims submitted. *See* Stipulation ¶14.

2018) ("The existence of a termination option triggered by the number of class members who opt out of the Settlement does not by itself render the Settlement unfair.").

D. The Settlement Treats Class Members Equitably Relative to Each Other

Rule 23(e)(2)(D) requires that the Court assess whether "the proposal treats class members equitably relative to each other." Fed. R. Civ. P. 23(e)(2)(D). As discussed below in Part II, under the Plan of Allocation, eligible Claimants approved for payment by the Court will receive their *pro rata* share of the recovery based on the amount and timing of their transactions in Frontier Securities. Lead Plaintiffs will receive precisely the same level of *pro rata* recovery, calculated under the same Plan of Allocation provisions, as other Settlement Class Members.

E. The Reaction of the Settlement Class to the Settlement

Though not expressly set forth in Rule 23(e)(2), another *Grinnell* factor to be considered is the reaction of the class to the Settlement. *See, e.g.*, *In re Bear Stearns Cos., Inc. Sec., Derivative, & ERISA Litig.*, 909 F. Supp. 2d 259, 266-67 (S.D.N.Y. 2012); *FLAG Telecom*, 2010 WL 4537550, at *15-16; *Veeco*, 2007 WL 4115809, at *7. This factor also supports approval: while the April 19, 2022 deadline set by the Court for Settlement Class Members to object or exclude themselves from the Settlement Class has not yet passed, to date no objections to the Settlement and 18 requests for exclusion have been received. ¶94; Ewashko Decl. ¶13. As provided in the Preliminary Approval Order, Lead Plaintiffs will address all requests for exclusion and any objections received in reply papers (which are to be filed by May 3, 2022). To date, however, the reaction of the Settlement Class further supports a finding that the Settlement is fair, reasonable, and adequate.

II. THE PLAN OF ALLOCATION SHOULD BE APPROVED

A plan for allocating settlement proceeds, like the settlement itself, should be approved if it is fair, reasonable, and adequate. *See In re IMAX Sec. Litig.*, 283 F.R.D. 178, 192 (S.D.N.Y. 2012); *Bear Stearns*, 909 F. Supp. 2d at 270. A plan of allocation is fair and reasonable as long as

it has a "rational basis." *In re Signet Jewelers Ltd. Sec. Litig.*, 2020 WL 4196468, at *13 (S.D.N.Y. July 21, 2020); *FLAG Telecom*, 2010 WL 4537550, at *21. Generally, a plan of allocation that reimburses class members based on the relative strength and value of their claims is reasonable. *See Signet*, 2020 WL 4196468, at *13. In determining whether a plan of allocation is reasonable, "courts give great weight to the opinion of experienced counsel." *Id*.; *see also Priceline.com,* 2007 WL 2115592, at *4 ("[T]he adequacy of an allocation plan turns on whether counsel has properly apprised itself of the merits of all claims, and whether the proposed settlement is fair and reasonable in light of that information.")

Here, the proposed Plan of Allocation (or "Plan") was developed by Lead Counsel in consultation with Lead Plaintiffs' damages expert and was set forth in full in the Notice mailed to potential Settlement Class Members. *See* Ewashko Decl. (Ex. 3), Ex. A, at Appendix A. Lead Counsel respectfully submits that the Plan provides a fair and reasonable method to allocate the Net Settlement Fund among Settlement Class Members who submit valid Claim Forms, based on the damages they suffered on their investments in Frontier Securities. ¶¶95-102.

The Plan calculates a Recognized Loss Amount for each purchase or acquisition of publicly traded common stock and Mandatory Convertible Preferred Stock of Frontier during the Class Period. ¶99. Lead Plaintiffs' damages expert calculated the estimated amounts of artificial inflation in the per share closing prices of Frontier Securities that allegedly was proximately caused by Defendants' alleged materially false and misleading statements and omissions—the traditional method for measuring damages under Section 10(b) of the Exchange Act. *Id*. The sum of a claimant's Recognized Loss Amounts for all purchases and acquisitions of Frontier Securities during the Class Period is the Claimant's "Recognized Claim," and the Net Settlement Fund will

be allocated to Authorized Claimants on a *pro rata* basis based on the relative size of their Recognized Claims. ¶100.

Under the Plan of Allocation, the entire Net Settlement Fund will be distributed to Authorized Claimants. If any funds remain after the initial *pro rata* distribution, as a result of uncashed or returned checks or other reasons, subsequent cost-effective distributions to Authorized Claimants will be conducted. Only when the residual amount left for re-distribution to Settlement Class Members is so small that a further re-distribution would not be cost effective (for example, where the administrative costs of conducting the additional distribution would largely subsume the funds available), will those funds be donated to one or more non-sectarian, not-for-profit, 501(c)(3) organizations, to be recommended by Lead Counsel and approved by the Court.

Lead Counsel believes that the Plan of Allocation provides a fair and reasonable method to equitably allocate the Net Settlement Fund among Settlement Class Members who suffered losses as result of the conduct alleged in the Action. ¶102. Moreover, as noted above, as of April 4, 2022, 737,095 copies of the Notice, which contained the Plan of Allocation and advised Settlement Class Members of their right to object to the Plan of Allocation, had been sent out—yet no objections to the proposed Plan have been received. *See* ¶94; Ewashko Decl. ¶8.

III. THE SETTLEMENT CLASS SHOULD BE CERTIFIED

In connection with the Settlement, the Parties have stipulated to the certification of the Settlement Class for purposes of the Settlement. As detailed in Lead Plaintiffs' motion for preliminary approval of the Settlement, the Settlement Class satisfies all the requirements of Rules 23(a) and (b)(3) of the Federal Rules of Civil Procedure. *See* ECF No. 192-1 at 18-24. There has been no objection to certification. Accordingly, Lead Plaintiffs respectfully request that the Court certify the Settlement Class under Rules 23(a) and (b)(3).

IV. THE NOTICE TO THE SETTLEMENT CLASS SATISFIED THE REQUIREMENTS OF RULE 23 AND DUE PROCESS

The Notice to the Settlement Class satisfied the requirements of Rule 23(c)(2)(B), which requires "the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Fed. R. Civ. P. 23(c)(2)(B); *see also Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173-75 (1974). The Notice also satisfied Rule 23(e)(1), which requires that notice of a settlement be "reasonable"—i.e., it must "fairly apprise the prospective members of the class of the terms of the proposed settlement and of the options that are open to them in connection with the proceedings." *Visa*, 396 F.3d at 114.

Both the substance of the Notice and the method of its dissemination to potential members of the Settlement Class satisfied these standards. The Court-approved Notice includes all the information required by Federal Rule of Civil Procedure 23(c)(2)(B) and the PSLRA, 15 U.S.C. § 78u-4(a)(7), including: (i) an explanation of the nature of the Action and the claims asserted; (ii) the definition of the Settlement Class; (iii) the amount of the Settlement; (iv) a description of the Plan of Allocation; (v) an explanation of the reasons why the Parties are proposing the Settlement; (vi) a statement indicating the attorneys' fees and costs that will be sought; (vii) a description of Settlement Class Members' right to opt-out of the Settlement Class or to object to the Settlement, the Plan of Allocation, or the requested attorneys' fees or expenses; and (viii) notice of the binding effect of a judgment on Settlement Class Members.

As noted above, in accordance with the Court's Preliminary Approval Order, the Court-approved Claims Administrator (A.B. Data), began mailing copies of the Notice Packet to potential Settlement Class Members on February 15, 2022. *See* Ewashko Decl. ¶¶4-8. As of April 4, 2022, A.B. Data had disseminated 737,095 copies of the Notice Packet to potential Settlement Class Members and nominees. *See id*. ¶8. In addition, A.B. Data caused the Summary Notice to be

published in *Investor's Business Daily* and transmitted over *PR Newswire* on February 28, 2022. *See id*. ¶9. Copies of the Notice, Claim Form, Stipulation, Preliminary Approval Order, and Complaint were made available on the settlement website maintained by A.B. Data beginning on February 15, 2022. *See id.* ¶¶10-11. This combination of individual mail to all Settlement Class Members who could be identified with reasonable effort, supplemented by notice in an appropriate, widely circulated publication, transmitted over the newswire, and set forth on internet websites, was "the best notice . . . practicable under the circumstances." Fed. R. Civ. P. 23(c)(2)(B); *see, e.g.*, *In re Qudian Inc. Sec. Litig.,* 2021 WL 2383550, at *3 (S.D.N.Y. June 8, 2021); *In re Blue Apron Holdings, Inc. Sec. Litig.,* 2021 WL 345790, at *4 (E.D.N.Y. Feb. 1, 2021); *Advanced Battery Techs.*, 298 F.R.D. at 182-83.

CONCLUSION

For the foregoing reasons, Lead Plaintiffs respectfully request that the Court approve the proposed Settlement and the proposed Plan of Allocation as fair, reasonable, and adequate.

Dated: April 5, 2022

Respectfully submitted,

/s/ Katherine M. Sinderson

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CERTIFICATE OF SERVICE

I certify that on April 5, 2022 a copy of the foregoing Declaration of Katherine M. Sinderson in Support of (A) Lead Plaintiffs' Motion for Final Approval of Settlement and Plan of Allocation; and (B) Lead Counsel's Motion for Attorneys' Fees and Litigation Expenses was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the Court's CM/ECF System.

/s/ Katherine M. Sinderson
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