UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

In re GRAÑA Y MONTERO S.A.A. SECURITIES LITIGATION	Civil Action No. 2:17-cv-01105-LDH-ST
	CLASS ACTION
This Document Relates To: ALL ACTIONS.	MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT AND APPROVAL OF PLAN OF ALLOCATION

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Pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, Lead Plaintiff Treasure Finance Holding Corp. and plaintiff Marcia Goldberg (collectively, "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 $20,000,000 Settlement (the "Settlement Amount") reached in this action (the "Litigation") and approval of the Plan of Allocation (the "Plan"). The terms of the Settlement are set forth in the Stipulation and Agreement of Settlement dated July 2, 2020 (the "Stipulation"). ECF No. 112-2.[1]

I. INTRODUCTION

Plaintiffs' $20 million recovery is the result of their rigorous three-year effort to prosecute this highly contested litigation, in addition to extensive arm's-length settlement negotiations by experienced and knowledgeable counsel, overseen by a nationally renowned mediator. The Settlement represents a very good result for the Settlement Class and easily satisfies each of the Rule 23(e)(2) factors, as well as the factors set forth in the Second Circuit decision of *Detroit v. Grinnell Corp.*, 495 F.2d 448 (2d Cir. 1974).

The Settlement is especially beneficial to the Settlement Class in light of the substantial litigation risks Plaintiffs faced. The gravamen of Plaintiffs' claims was that, during the Class Period, Defendants engaged in an alleged undisclosed scheme to bribe numerous high-ranking officials to secure lucrative public-works construction projects in Peru. While Plaintiffs believe in the merit of their claims, Defendants had strong and credible arguments that: (1) there is no general duty to

[1] All capitalized terms not otherwise defined herein shall have the meanings set forth in the Stipulation and the Declaration of David A. Rosenfeld and Corey D. Holzer in Support of Motions for Final Approval of Class Action Settlement and Approval of Plan of Allocation and an Award of Attorneys' Fees and Expenses and Award to Plaintiff Pursuant to 15 U.S.C. §78u-4(a)(4) ("Joint Decl."), submitted herewith. Citations are omitted and emphasis is added throughout unless otherwise noted.

disclose uncharged, unproven criminal conduct; (2) Plaintiffs did not plead any falsity in Graña's financial statements; (3) statements about corporate governance and ethics are inactionable puffery; (4) many of the alleged misstatements are forward-looking statements protected by the Private Securities Litigation Reform Act of 1995 ("PSLRA") safe harbor provision; (5) Graña's statements regarding the effectiveness of its disclosure controls are not actionable; (6) Plaintiffs had not adequately alleged scienter; and (7) Plaintiffs did not adequately plead loss causation with respect to Graña's internal controls. Joint Decl., ¶36. Indeed, at the time the Settlement was reached, Defendants' motions to dismiss Plaintiffs' Second Consolidated Amended Class Action Complaint for Violations of the Federal Securities Laws (the "SAC") were pending before the Court.[2]

Plaintiffs and Lead Counsel had a thorough understanding of the strengths and weaknesses of the case before reaching the Settlement, as they had conducted significant factual investigation into the merits of their claims, engaged in multiple rounds of briefing in connection with Defendants' motions to dismiss, including pre-motion letters, and formal mediation. Based on this experience, Plaintiffs knew that Defendants' motions to dismiss the SAC might have succeeded, resulting in no recovery at all. Moreover, a skilled and highly reputable securities litigation mediator – Gregory P. Lindstrom, Esq. of Phillips ADR Enterprises – assisted the parties in reaching a resolution of the case for $20 million.

Given the risks to proceeding and the excellent recovery obtained, Plaintiffs respectfully submit that the $20 million Settlement and the Plan of Allocation – which was prepared with the assistance of Plaintiffs' counsel's in-house damages consultant, and is substantially similar to numerous other such plans that have been approved in this Circuit – are fair and reasonable in all

[2] Defendants further maintained that even if the SAC survived dismissal, Plaintiffs would face serious difficulties conducting discovery in Peru and Brazil. Defendants also would continue to argue that the Court lacked jurisdiction over a number of the defendants named in the SAC.

respects. Accordingly, Plaintiffs respectfully request that the Court grant final approval of the settlement under Rule 23(e) of the Federal Rules of Civil Procedure.

II. FACTUAL AND PROCEDURAL BACKGROUND

To avoid repetition, Plaintiffs respectfully refer the Court to the accompanying Joint Declaration for a detailed discussion of the factual background and procedural history of the Litigation, the extensive efforts undertaken by Plaintiffs and their counsel during the course of the Litigation, the risks of continued litigation, and the negotiations leading to the Settlement.

III. STANDARDS FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENTS

A. The Law Favors and Encourages Settlements

"Courts examine procedural and substantive fairness in light of the 'strong judicial policy favoring settlements' of class action suits." *McMahon v. Olivier Cheng Catering & Events, LLC*, No. 08 Civ. 8713(PGG), 2010 WL 2399328, at *3 (S.D.N.Y. Mar. 3, 2010) (citing *Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 116 (2d Cir. 2005)); *see also In re Advanced Battery Techs., Inc. Sec. Litig.*, 298 F.R.D. 171, 174 (S.D.N.Y. 2014) ("The law favors settlement, particularly in class actions and other complex cases where substantial resources can be conserved by avoiding the time, cost and rigor of prolonged litigation."). Thus, the Second Circuit has instructed that, while a court should not give "rubber stamp approval" to a proposed settlement, it should "stop short of the detailed and thorough investigation that it would undertake if it were actually trying the case." *Grinnell*, 495 F.2d at 462.

As set forth below, the $20 million Settlement here, particularly in light of the significant litigation risks Plaintiffs faced, is manifestly reasonable, fair, and adequate under all of the pertinent factors courts use to evaluate a settlement. Accordingly, the Settlement warrants final approval from this Court.

B. The Settlement Must Be Procedurally and Substantively Fair, Adequate, and Reasonable

Federal Rule of Civil Procedure 23(e) requires judicial approval of a class action settlement. Rule 23(e)(2), as recently amended, provides that courts should consider certain factors when determining whether a class action settlement is "fair, reasonable and adequate" such that final approval is warranted:

> (A) the class representatives and class counsel have adequately represented the class;
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> (B) the proposal was negotiated at arm's length;
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> (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 attorneys' 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 considers the following factors (the "*Grinnell* Factors"), which overlap with the Rule 23(e)(2) factors, when determining whether to approve a class action settlement: (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 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 of the attendant

risks of litigation. *Grinnell*, 495 F.2d at 463; *see also In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 330 F.R.D. 11, 29 (E.D.N.Y. 2019) (explaining that "the new Rule 23(e) factors [] add to, rather than displace, the *Grinnell* Factors," and "there is significant overlap" between the two "as they both guide a court's substantive, as opposed to procedural, analysis"). *See also In re Namenda Direct Purchaser Antitrust Litig.*, No. 15 Civ. 7488 (CM), 2020 WL 2749223, at *2-*3 (S.D.N.Y. May 27, 2020).

For a settlement to be deemed substantively and procedurally fair, reasonable and adequate, not every factor need be satisfied. "[R]ather, the court should consider the totality of these factors in light of the particular circumstances." *Thompson v. Metro Life Ins. Co.*, 216 F.R.D. 55, 61 (S.D.N.Y. 2003) (citing *D'Amato v. Deutsche Bank*, 236 F.3d 78, 86 (2d Cir. 2001)). Additionally, "'[a]bsent fraud or collusion, courts should be hesitant to substitute their judgment for that of the parties who negotiated the settlement.'" *Yuzary v. HSBC Bank, USA, N.A.*, No. 12 Civ. 3693(PGG), 2013 WL 5492998, at *4 (S.D.N.Y. Oct. 2, 2013); *see also In re Glob. Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 455 (S.D.N.Y. 2004) (courts should not substitute their "'business judgment for that of counsel, absent evidence of fraud or overreaching'").

Under the recently amended Rule 23(e)(2), courts now "must assess at the preliminary approval stage whether the parties have shown that the court will likely find that the [Rule 23(e)(2)] factors weigh in favor of final settlement approval." *Payment Card Interchange*, 330 F.R.D. at 28. As set forth in Plaintiffs' Memorandum of Law in Support of Unopposed Motion for Preliminary Approval of Class Action Settlement, Certification of the Settlement Class, and Approval of Notice to the Settlement Class (ECF No. 112-1), and acknowledged by this Court's Preliminary Approval Order (ECF No. 115), Plaintiffs meet all of the requirements imposed by Rule 23(e)(2). Courts have noted that a plaintiff's satisfaction of these factors is virtually assured where, as here, little has

changed between preliminary approval and final approval. *See In re Chrysler-Dodge-Jeep Ecodiesel Mktg., Sales Practices & Prods. Liability Litig.*, No. 17-md-02777-EMC, 2019 WL 2554232, at *2 (N.D. Cal. May 3, 2019) (finding that the "conclusions [made in granting preliminary approval] stand and counsel equally in favor of final approval now"); *Snyder v. Ocwen Loan Servicing, LLC*, No. 14 C 8461, 2019 WL 2103379, at *4 (N.D. Ill. May 14, 2019) (noting in analyzing Rule 23(e)(2) that "[s]ignificant portions of the Court's analysis remain materially unchanged from the previous order [granting preliminary approval]").

C. The Proposed Settlement Is Procedurally and Substantively Fair, Adequate, and Reasonable

1. The Settlement Satisfies the Requirements of Rule 23(e)(2)

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

The determination of adequacy "typically 'entails inquiry as to whether: 1) plaintiff's interests are antagonistic to the interest of other members of the class and 2) plaintiff's attorneys are qualified, experienced, and able to conduct the litigation.'" *Cordes & Co. Fin. Servs. v. A.G. Edwards & Sons, Inc.*, 502 F.3d 91, 99 (2d Cir. 2007). Here, Plaintiffs' interests are not antagonistic to, and in fact are directly aligned with, the interests of other Members of the Settlement Class. Additionally, Plaintiffs and Lead Counsel have adequately represented the Settlement Class by zealously prosecuting this action, including by, among other things, conducting an extensive investigation of the relevant factual events, including civil and criminal proceedings in Peru and Brazil, drafting two highly detailed amended complaints, retaining counsel fluent in Spanish and Portuguese to assist in the prosecution of the case, engaging in two rounds of briefing to oppose Defendants' motions to dismiss and responding to Defendants' letter briefs, and preparing for and participating in a mediation session before Mr. Lindstrom. *See generally* Joint Decl. Through each

step of the Litigation, Plaintiffs and Lead Counsel have strenuously advocated for the best interests of the Settlement Class. Plaintiffs and Lead Counsel therefore satisfy Rule 23(e)(2)(A) for purposes of final approval.

b. The Proposed Settlement Was Negotiated at Arm's Length Before an Experienced Mediator

Plaintiffs satisfy Rule 23(e)(2)(B) because the Settlement is the product of arm's-length negotiations between the parties' counsel before a neutral mediator, with no hint of collusion. Joint Decl., ¶¶55-58. Indeed, the use of the mediation process provides compelling evidence that the Settlement is not the result of collusion. *See In re Facebook, Inc., IPO Sec. & Derivative Litig.*, 343 F. Supp. 3d 394, 408-09 (S.D.N.Y. 2018) (settlement was procedurally fair where it was "based on the suggestion by a neutral mediator"), *aff'd*, 822 F. App'x 40 (2d Cir. 2020); *McMahon*, 2010 WL 2399328, at *4 ("Arm's length negotiations involving counsel and a mediator raise a presumption that the settlement they achieved meets the requirements of due process.") (citing *Wal-Mart Stores*, 396 F.3d at 116); *D'Amato*, 236 F.3d at 85 (a "mediator's involvement in . . . settlement negotiations helps to ensure that the proceedings were free of collusion and undue pressure"). Moreover, the Settlement negotiations in this case were "carried out under the direction of Lead Plaintiff[], . . . whose involvement suggests procedural fairness." *Facebook*, 343 F. Supp. 3d at 409.

It is well-settled in this Circuit that "a class action settlement enjoys a strong 'presumption of fairness' where it is the product of arm's-length negotiations concluded by experienced, capable counsel." *Advanced Battery*, 298 F.R.D. at 175 (citing *Wal-Mart Stores*, 396 F.3d at 116); *see also Charron v. Pinnacle Grp. NY LLC*, 874 F. Supp. 2d 179, 195 (S.D.N.Y. 2012) ("Recommendations of experienced counsel are entitled to great weight in evaluating a proposed settlement in a class action because such counsel are most closely acquainted with the facts of the underlying litigation."), *aff'd sub nom. Charron v. Wiener*, 731 F.3d 241 (2d. Cir. 2013); *McMahon*, 2010 WL 2399328, at

*4 (settlement was "procedurally fair, reasonable, adequate and not a product of collusion" where it was reached after "arm's-length negotiations between the parties"). Accordingly, this factor weighs heavily in favor of the Court granting final approval of the Settlement.

c. The Proposed Settlement Is Adequate in Light of the Litigation Risks, Costs, and Delays of Trial and Appeal

Rule 23(e)(2)(C)(i) and the first, fourth and fifth *Grinnell* factors overlap, as they address the substantive fairness of the Settlement in light of the risks posed by continuing litigation. As set forth below, these factors weigh in favor of final approval.

(1) The Risks of Establishing Liability at Trial

In considering this factor, "the Court need only assess the risks of litigation against the certainty of recovery under the proposed settlement." *Glob. Crossing*, 225 F.R.D. at 459. As a preliminary matter, the significant unpredictability and complexity posed by securities class actions generally weigh in favor of final approval. Indeed, "'[i]n evaluating the settlement of a securities class action, federal courts, including this Court, have long recognized that such litigation is notably difficult and notoriously uncertain.'" *Christine Asia Co., Ltd. v. Yun Ma*, No. 1:15-md-02631(CM)(SDA), 2019 WL 5257534, at *10 (S.D.N.Y. Oct. 16, 2019); *see also In re Flag Telecom Holdings, Ltd. Sec. Litig.*, No. 02-CV-3400(CM)(PED), 2010 WL 4537550, at *15 (S.D.N.Y. Nov. 8, 2010) (same); *In re AOL Time Warner Inc. Sec. & ERISA Litig.*, No. 02 Civ. 5575(SWK), 2006 WL 903236, at *11 (S.D.N.Y. Apr. 6, 2006) ("The difficulty of establishing liability is a common risk of securities litigation."). Although Plaintiffs and Lead Counsel firmly believe that the claims asserted in the Litigation are meritorious, and that they would prevail at trial, further litigation against Defendants posed risks that made any recovery uncertain.

As set forth above and in the Joint Declaration, at the time of the Settlement, Defendants' motions to dismiss the SAC were pending.[3] If they had been granted, it is unknown if Plaintiffs would be provided any further opportunity to amend their complaint. Defendants have vigorously contested their liability and have denied and continue to deny each and every claim and allegation of wrongdoing. Specifically, Defendants have argued that Plaintiffs have not alleged any actionable material misstatements or omissions, and that Plaintiffs had not sufficiently alleged Defendants' scienter. Joint Decl., ¶¶72-73. *See, e.g.*, *Kalnit v. Eichler*, 99 F. Supp. 2d 327, 345 (S.D.N.Y. 2000) ("The element of scienter is often the most difficult and controversial aspect of a securities fraud claim."), *aff'd*, 264 F.3d 131 (2d Cir. 2001). In light of the difficulty of pleading falsity, materiality, scienter, and loss causation in securities fraud class actions under the high bar of the PSLRA, Plaintiffs knew they faced a substantial risk that the Court would grant Defendants' motions to dismiss, leaving Plaintiffs with no recovery at all.

(2) The Risks of Establishing Loss Causation and Damages at Trial

The risks of establishing liability apply with equal force to establishing damages. Here, Defendants argued that Plaintiffs had not adequately alleged (and could not prove) loss causation with respect to alleged misrepresentations concerning Graña's internal controls. Joint Decl., ¶36. Had litigation continued, Plaintiffs would have relied heavily on expert testimony to establish loss causation and damages, likely leading to a battle of the experts at trial and a *Daubert* challenge. If the Court were to determine that one or more of Plaintiffs' experts should be excluded from testifying at trial, Plaintiffs' case would become much more difficult to prove.

[3] Plaintiffs had moved for approval to serve certain Defendants by alternative means. That motion was granted in part and denied in part. ECF No. 73. Joint Decl., ¶¶33-35, 43, 45-46.

Thus, in light of the very significant risks Plaintiffs faced at the time of the Settlement with regard to establishing liability and damages, this factor weighs heavily in favor of final approval.

(3) The Settlement Eliminates the Additional Costs and Delay of Continued Litigation

The anticipated complexity, cost, and duration of the Litigation would be considerable. *See Advanced Battery*, 298 F.R.D. at 175 ("the complexity, expense, and likely duration of litigation are critical factors in evaluating the reasonableness of a settlement"). Indeed, if not for the Settlement, the Litigation, which has already been pending for three years, would have continued through the motions to dismiss, and fact and expert discovery. Defendants contend that much of the documentary evidence relevant to this case is in Peru in the possession of third parties (or unserved defendants), and the taking of discovery from such non-parties is unenforceable under Peruvian laws. Documents, if obtained, would have to be translated. *See Christine Asia*, 2019 WL 5257534, at *10 ("As a practical matter, this case would be particularly onerous and expensive to litigate given that it involves litigating against a foreign defendant."). Several defendants remain unserved.[4] The subsequent motions for class certification and summary judgment, as well as the preparation for what would likely be a multi-week trial, would have caused the action to persist for several more years before the Settlement Class could possibly receive any recovery. Such a lengthy and highly uncertain process would not serve the best interests of the Settlement Class compared to the immediate, certain monetary benefits of the Settlement. *See Stougo v. Bassini*, 258 F. Supp. 2d 254, 261 (S.D.N.Y. 2003) ("even if a shareholder or class member was willing to assume all the risks of pursuing the actions through further litigation . . . the passage of time would introduce yet more risks

[4] COVID-19 will cause further delays. Joint Decl., ¶¶59,74,79. The virus has negatively impacted Graña's operations, as the number of infections and fatalities in Peru is quite high. Should discovery commence, it would be significantly delayed until the virus is under control and normal business operations resume, which take many years.

. . . and would, in light of the time value of money, make future recoveries less valuable than this current recovery"); *Hicks v. Morgan Stanley*, No. 01 Civ. 10071(RJH), 2005 WL 2757792, at *6 (S.D.N.Y. Oct. 24, 2005) ("Further litigation would necessarily involve further costs [and] justice may be best served with a fair settlement today as opposed to an uncertain future settlement or trial of the action.").

Accordingly, the Rule 23(e)(2)(C)(i) factor, as well as the first, fourth and fifth *Grinnell* factors, all weigh in favor of final approval.

d. The Proposed Method for Distributing Relief Is Effective

With respect to Rule 23(e)(2)(C)(ii), Plaintiffs and Lead Counsel have taken appropriate steps to ensure that the Settlement Class is notified about the Settlement. Pursuant to the Preliminary Approval Order (ECF No. 115), more than 13,600 copies of the Notice and Proof of Claim were mailed to potential Settlement Class Members and nominees, and the Summary Notice was published in *The Wall Street Journal* and transmitted over *Business Wire*. *See* Declaration of Ross D. Murray Regarding Notice Dissemination, Publication, and Requests for Exclusion Received to Date ("Murray Decl."), ¶¶11-12, submitted herewith. Additionally, a settlement-specific website was created where key Settlement documents were posted, including the Stipulation, Notice, Proof of Claim, and Preliminary Approval Order. *Id.*, ¶14. Settlement Class Members have until November 10, 2020 to object to the Settlement or request exclusion from the Settlement Class. While that date has not yet passed, to date there have been no objections to the Settlement, and no requests for exclusion. *Id.*, ¶16. Settlement Class Members have until January 13, 2021 to submit claim forms. The claims process is similar to that typically used in securities class action settlements. *See Christine Asia*, 2019 WL 5257534, at *14 ("[t]his type of claims processing and

method for distributing settlement proceeds is standard in securities and other class actions and is effective"). This factor therefore supports final approval.

e. Lead Counsel's Request for Attorneys' Fees Is Reasonable

Rule 23(e)(2)(C)(iii) addresses "the terms of any proposed award of attorney's fees, including timing of payment." Fed. R. Civ. P. 23(e)(2)(C)(iii). Consistent with the Notice, and as discussed in Lead Counsel's fee memorandum, Lead Counsel seeks an award of attorneys' fees in the amount of 25% of the Settlement Amount, and expenses in the amount of $54,774.05, in addition to interest on both amounts, to be paid at the time of award.[5]

As set forth in Lead Counsel's fee memorandum, this request is in line with, and in some cases below, recent fee awards in this District in similar common-fund cases.

Lead Counsel's fee request is reasonable, and Plaintiffs have ensured that the Settlement Class is fully apprised of the terms of the proposed award of attorneys' fees, including the timing of such payments. Accordingly, this factor supports final approval of the Settlement.

f. The Parties Have No Other Agreements Besides Opt-Outs

Rule 23(e)(2)(C)(iv) requires the consideration of any agreement required to be disclosed under Rule 23(e)(3). As previously disclosed in connection with Plaintiffs' motion for preliminary approval of the Settlement, ECF No. 112-1 at 7, the parties have entered into a standard supplemental agreement providing that, in the event Settlement Class Members with a certain

[5] The Stipulation provides that any attorneys' fees and expenses awarded by the Court shall be paid to Lead Counsel when the Court executes the Judgment and an Order awarding such fees and expenses. *See* Stipulation, ¶6.2; *see also Pelzer v. Vassalle*, 655 F. App'x 352, 365 (6th Cir. 2016) (finding the "quick-pay provision" did "not harm the class members in any discernible way, as the size of the settlement fund available to the class will be the same regardless of when the attorneys get paid").

aggregate amount of valid claims opt out of the Settlement, Graña shall have the option to terminate the Settlement. This agreement has no bearing on the fairness of the Settlement, and as such, this factor weighs in favor of final approval. *See Christine Asia*, 2019 WL 5257534, at *15 (stating that opt-out agreements are "standard in securities class action settlements and ha[ve] no negative impact on the fairness of the Settlement").

g. The Settlement Ensures Settlement Class Members Are Treated Equitably

Rule 23(e)(2)(D), the final factor, considers whether class members are treated equitably. As discussed further below in §IV, Lead Counsel developed the Plan of Allocation in consultation with their damages consultant to treat Settlement Class Members equitably relative to each other by: (i) taking into account the timing of their Graña ADS purchases, acquisitions, and sales; and (ii) providing that each Authorized Claimant shall receive his, her, or its *pro rata* share of the Net Settlement Fund based on their recognized losses. Plaintiffs will be subject to the same formula for distribution of the Net Settlement Fund as every other Settlement Class Member. This factor therefore merits granting final approval of the Settlement.

Based on the foregoing, Plaintiffs and Lead Counsel respectfully submit that each of the Rule 23(e)(2) factors support granting final approval of the Settlement.

2. The Settlement Satisfies the Remaining *Grinnell* Factors

a. The Lack of Objections to Date Supports Final Approval

The reaction of the class to the settlement "is considered perhaps 'the most significant factor to be weighed in considering its adequacy,'" *In re Veeco Instruments Inc. Sec. Litig.*, No. 05 MDL 01695(CM), 2007 WL 4115809, at *7 (S.D.N.Y. Nov. 7, 2007), such that the "'absence of objections may itself be taken as evidencing the fairness of a settlement.'" *City of Providence v.*

Aeropostale, Inc., No. 11 Civ. 7132(CM)(GWG), 2014 WL 1883494, at *5 (S.D.N.Y. May 9, 2014), *aff'd sub nom. Arbuthnot v. Pierson*, 607 F. App'x 73 (2d Cir. 2015).

While the deadline to submit objections and exclusions as not yet passed, no objections have been received to date. Nor have any requests for exclusion been received. Murray Decl., ¶16. This positive reaction of the Settlement Class supports approval of the Settlement. *See Yuzary*, 2013 WL 5492998, at *6 (the "favorable response" from the class "demonstrates that the class approves of the settlement and supports final approval"); *Facebook*, 343 F. Supp. 3d at 410 ("[t]he overwhelming positive reaction – or absence of a negative reaction – weighs strongly in favor" of final approval).

b. Plaintiffs Had Sufficient Information to Make an Informed Decision Regarding the Settlement

Under the third *Grinnell* factor, "'the question is whether the parties had adequate information about their claims such that their counsel can intelligently evaluate the merits of plaintiff's claims, the strengths of the defenses asserted by defendants, and the value of plaintiffs' causes of action for purposes of settlement.'" *In re Bear Stearns Cos., Inc. Sec., Derivative & ERISA Litig.*, 909 F. Supp. 2d 259, 267 (S.D.N.Y. 2012); *Martignago v. Merrill Lynch & Co., Inc.*, No. 11-cv-03923-PGG, 2013 WL 12316358, at *6 (S.D.N.Y. Oct. 3,2013) ("The pertinent question is 'whether counsel had an adequate appreciation of the merits of the case before negotiating.'"). "To satisfy this factor, parties need not have even engaged in formal or extensive discovery." *In re Hi-Crush Partners L.P. Sec. Litig.*, No. 12-Civ-8557 (CM), 2014 WL 7323417, at *7 (S.D.N.Y. Dec. 19, 2014) (noting that in cases brought under the PSLRA, discovery cannot commence until the motion to dismiss is denied); *see also Glob. Crossing*, 225 F.R.D. at 458 ("Formal discovery is not a prerequisite; the question is whether the parties had adequate information about their claims.").

Plaintiffs and Lead Counsel had sufficient information to assess the adequacy of the Settlement. As detailed in the Joint Declaration, Plaintiffs and Lead Counsel negotiated the

Settlement only after conducting an extensive factual investigation, which included the review of Graña's SEC filings, news reports, and other publicly available information, including documents and pleadings from ongoing Peruvian and Brazilian investigations and litigation. *See generally* Joint Decl. Lead Counsel's thorough investigation continued with the drafting of two detailed amended complaints, vigorously opposing multiple rounds of motions to dismiss, and litigating a motion concerning alternative service. Plaintiffs also participated in a hard-fought mediation session with Defendants, overseen by an experienced and nationally renowned mediator, which ultimately resulted in the Settlement. *Id.* During the mediation, Defendants' Counsel pressed the arguments raised in their motions to dismiss, in addition to further arguments they intended to make if the case were to progress. *Id.*

Thus, by the time of the Settlement, Plaintiffs were well-versed in the strengths and weaknesses of the case. This factor weighs in favor of final approval.

c. Maintaining Class-Action Status Through Trial Presents a Substantial Risk

Plaintiffs' ability to maintain class-action status through trial presented a substantial risk in this Litigation. Although Plaintiffs believe they would have prevailed on a motion to certify the class, Defendants were poised to vigorously oppose the motion. Moreover, even if the motion had been granted, Defendants could still have moved to decertify the class or trim the class period before trial or on appeal, as class certification may be reviewed at any stage of the litigation. *See Christine Asia*, 2019 WL 5257534, at *13 (stating that this risk weighed in favor of final approval because "a class certification order may be altered or amended any time before a decision on the merits"); Fed. R. Civ. P. 23(c) (authorizing a court to decertify a class at any time). "The risk of maintaining class status throughout trial [] weighs in favor of final approval." *McMahon*, 2010 WL 2399328, at *5.

d. Defendants' Ability to Withstand a Greater Judgment

This factor is not dispositive when all other factors favor approval. Even if Defendants could have withstood a greater judgment, however, a "'defendant's ability to withstand a greater judgment, standing alone, does not suggest that the settlement is unfair.'" *Castagna v. Madison Square Garden, L.P.*, No. 09-CV-10211(LTS)(HP), 2011 WL 2208614, at *7 (S.D.N.Y. June 7, 2011); *see also Aeropostale*, 2014 WL 1883494, at *9 (courts "generally do not find the ability of a defendant to withstand a greater judgment to be an impediment to settlement when the other factors favor the settlement"). A "defendant is not required to 'empty its coffers' before a settlement can be found adequate." *In re Sony SXRD Rear Projection Television Class Action Litig.*, No. 06 Civ. 5173(RPP), 2008 WL 1956267, at *8 (S.D.N.Y. May 1, 2008). Here, though Graña might be able to endure a larger judgment, all other factors favor final approval. COVID-19 has adversely impacted the Company's operations, and may do so for the foreseeable future. The Company has so advised its shareholders in its public filings. Joint Decl., ¶79. Settlement now eliminates any risk to the Settlement Class of a prolonged disruption of the Company's business, which might affect the Company's ability to fund a settlement or judgment. *Id.*, ¶¶11, 59.[6]

e. The Settlement Amount Is Reasonable in View of the Best Possible Recovery and the Risks of Litigation

The adequacy of the amount offered in a settlement must be judged "not in comparison with the possible recovery in the best of all possible worlds, but rather in light of strengths and weaknesses of plaintiffs' case." *In re Agent Orange Prod. Liab. Litig.*, 597 F. Supp. 740, 762 (E.D.N.Y. 1984), *aff'd*, 818 F.2d 145 (2d Cir. 1987). A court need only determine whether the

[6] In fact, the timing of the funding of the Settlement was structured to ensure sufficient time for Graña to make its required payment to the Settlement Class. Joint Decl., ¶59. The Settlement Class is receiving interest on this as yet unpaid amount. *Id.*

settlement falls within a "range of reasonableness" that "recognizes the uncertainties of law and fact" in the case and "the concomitant risks and costs necessarily inherent in taking any litigation to completion." *Newman v. Stein*, 464 F.2d 689, 693 (2d Cir. 1972); *see also Glob. Crossing*, 225 F.R.D. at 461 ("the certainty of [a] settlement amount has to be judged in [the] context of the legal and practical obstacles to obtaining a large recovery").

Here, "[b]ecause Plaintiffs face serious challenges to establishing liability, consideration of Plaintiffs' best possible recovery must be accompanied by the risk of non-recovery." *Facebook*, 343 F. Supp. 3d at 414; *see also Bear Stearns*, 909 F. Supp. 2d at 270 (stating this *Grinnell* factor is "a function of both (1) the size of the amount relative to the best possible recovery; and (2) the likelihood of non-recovery"). Indeed, at the time of the parties' Settlement negotiations, Defendants' motion to dismiss was pending, and the outcome of the motion was uncertain. Likewise, the Settlement represents a recovery of between 15% and 24% of reasonably recoverable damages of between $84 million to $136 million, Joint Decl., ¶83, an amount that exceeds median recoveries in cases of this size. *See* Laarni T. Bulan and Laura E. Simmons, *Securities Class Action Settlements: 2019 Review and Analysis* at 6, Fig. 5 (Cornerstone Research 2020), https://www.cornerstone.com/Publications/Reports/Securities-Class-Action-Settlements-2019-Review-and-Analysis.[7]

Moreover, the $20 million Settlement Amount "was agreed upon only after careful consideration, both by competent lead counsel and by [a neutral mediator]" – all of whom concluded the Settlement represented a very good recovery for the Settlement Class in light of the substantial litigation risks Plaintiffs faced. *See Facebook*, 343 F. Supp. 3d at 414; *see also id.* (finding that even

[7] Not surprisingly, Defendants estimated reasonable recoverable damages at a significantly lower amount. Joint Decl., ¶83.

if the settlement "amounts to one-tenth – or less – of Plaintiffs' potential recovery," such a recovery is within "the range of reasonableness" where "the risks of a zero – or minimal – recovery scenario are real"). This factor weighs in favor of final approval.

IV. THE PLAN OF ALLOCATION IS FAIR AND ADEQUATE

The standard for approval of the Plan is the same as the standard for approving the Settlement as a whole: namely, "'it must be fair and adequate.'" *In re WorldCom, Inc. Sec. Litig.*, 388 F. Supp. 2d 319, 344 (S.D.N.Y. 2005). "'When formulated by competent and experienced class counsel,' a plan for allocation of net settlement proceeds 'need have only a reasonable, rational basis.'" *Advanced Battery*, 298 F.R.D. at 180; *see also Christine Asia*, 2019 WL 5257534, at *15-*16.

Here, as set forth in the Notice, the Plan was prepared with the assistance of Plaintiffs' damages consultant and has a rational basis, as it is based on the same methodology underlying Plaintiffs' measure of damages: the amount of artificial inflation in the price of Graña American Depository Shares during the Class Period. *See Facebook*, 343 F. Supp. 3d at 414 (plan of allocation was fair where it was "prepared by experienced counsel along with a damages expert – both indicia of reasonableness"). This is a fair method to apportion the Net Settlement Fund among Authorized Claimants, as it is based on, and consistent with, the claims alleged.

The Net Settlement Fund will be distributed to Authorized Claimants who timely submit valid Proofs of Claim that are approved for payment from the Net Settlement Fund under the Plan. Joint Decl., ¶¶84-86. The Plan treats all Settlement Class Members equitably, as everyone who submits a valid and timely Proof of Claim, and does not otherwise exclude himself, herself, or itself from the Settlement Class, will receive a *pro rata* share of the Net Settlement Fund in the proportion that the Authorized Claimant's claim bears to the total of the claims of all Authorized Claimants, so

long as such Authorized Claimant's payment amount is $10.00 or more. *See id.*; *see also* Murray Decl., Ex. A (Notice) at 9-11.

Plaintiffs and Lead Counsel believe that the Plan is fair and reasonable, and respectfully submit that it should be approved by the Court. Indeed, notably, there have been no objections to the Plan to date, which supports the Court's approval. *See Veeco*, 2007 WL 4115809, at *7.

V. THE COURT SHOULD FINALLY CERTIFY THE SETTLEMENT CLASS FOR PURPOSES OF EFFECTUATING THE SETTLEMENT

In their motion for preliminary approval of the Settlement, Plaintiffs requested that the Court certify the Settlement Class for settlement purposes only so that notice of the Settlement, the Settlement Hearing, and the rights of Settlement Class Members to object to the Settlement, request exclusion from the Settlement Class, or submit Proofs of Claim, could be issued. *See* ECF No. 112-1 at 18-23. In the Preliminary Approval Order, the Court addressed the requirements for class certification as set forth in Rules 23(a) and 23(b)(3) of the Federal Rules of Civil Procedure. The Court found that Plaintiffs had met the requirements for certification of the Settlement Class for purposes of settlement. ECF No. 115 at 2. Specifically, in the Preliminary Approval Order, the Court preliminarily certified a class of "all Persons who purchased or otherwise acquired Graña y Montero ADS from July 24, 2013 through February 24, 2017, inclusive." *Id.* In addition, the Court preliminarily certified Plaintiffs as class representatives and Lead Counsel as class counsel. *Id.* at 3.

Since the Court's entry of the Preliminary Approval Order, nothing has changed to alter the propriety of the Court's preliminary certification of the Settlement Class for settlement purposes. Thus, for all of the reasons stated in Plaintiffs' motion for preliminary approval (incorporated herein by reference), Plaintiffs respectfully request that the Court affirm its preliminary certification and finally certify the Settlement Class for purposes of carrying out the Settlement pursuant to Fed. R.

Civ. P. 23(a) and 23(b)(3), and appoint Plaintiffs as class representatives and Lead Counsel as class counsel.

VI. NOTICE TO THE SETTLEMENT CLASS SATISFIES THE REQUIREMENTS OF RULE 23 AND DUE PROCESS

Rule 23 requires that notice of a settlement be "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), and that it be directed to class members in a "reasonable manner." Fed. R. Civ. P. 23(e)(1)(B). Notice of a settlement satisfies Rule 23(e) and due process where it fairly apprises "'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.'" *Wal-Mart Stores*, 396 F.3d at 114; *Vargas v. Capital One Fin. Advisors*, 559 F. App'x 22, 26-27 (2d Cir. 2014). Notice is adequate "if the average person understands the terms of the proposed settlement and the options provided to class members thereunder." *In re Merrill Lynch Tyco Research Sec. Litig.*, 249 F.R.D. 124, 133 (S.D.N.Y. 2008) (citing *Wal-Mart Stores*, 396 F.3d at 114).

The Notice and the method used to disseminate the Notice to potential Settlement Class Members satisfy these standards. The Court-approved Notice and Proof of Claim (the "Notice Packet") amply inform Settlement Class Members of, among other things: (i) the pendency of the Litigation; (ii) the nature of the Litigation and the Settlement Class' claims; (iii) the essential terms of the Settlement; (iv) the proposed Plan; (v) Settlement Class Members' rights to request exclusion from the Settlement Class or object to the Settlement, the Plan, or the requested attorneys' fees or expenses; (vi) the binding effect of a judgment on Settlement Class Members; and (vii) information regarding Lead Counsel's motion for an award of attorneys' fees and expenses. The Notice also provides specific information regarding the date, time, and place of the Settlement Hearing, and sets forth the procedures and deadlines for: (i) submitting a Proof of Claim; (ii) requesting exclusion

from the Settlement Class; and (iii) objecting to any aspect of the Settlement, including the proposed Plan and the request for attorneys' fees and expenses.

The Notice also contains all the information required by the PSLRA, including: (i) a statement of the amount to be distributed, determined in the aggregate and on an average per share basis; (ii) a statement of the potential outcome of the case; (iii) a statement indicating the attorneys' fees and expenses sought; (iv) identification and contact information of counsel; and (v) a brief statement explaining the reasons why the parties are proposing the Settlement.

In accordance with the Preliminary Approval Order, Gilardi & Co. LLC ("Gilardi"), the Court-approved Claims Administrator, commenced the mailing of the Notice Packet by First-Class Mail to potential Settlement Class Members, brokers, and nominees on September 15, 2020. As of October 26, 2020, more than 13,600 copies of the Notice Packet have been mailed. Murray Decl., ¶11. Gilardi also published the Summary Notice in *The Wall Street Journal* and transmitted it over *Business Wire*. *Id.*, ¶12, Ex. C. Additionally, Gilardi posted the Notice Packet, as well as other important documents, on the website maintained for the Settlement. *Id.*, ¶14.

The combination of individual First-Class Mail to all potential Settlement Class Members who could be identified with reasonable effort, supplemented by mailed notice to brokers and nominees and publication of the Summary Notice in a relevant, widely-circulated publication and internet newswire, was "the best notice . . . practicable under the circumstances." Fed. R. Civ. P. 23(c)(2)(B); *see also Padro v. Astrue*, No. 11-CV-1788(CBA)(RLM), 2013 WL 5719076, at *3 (E.D.N.Y. Oct. 18, 2013) ("'Notice need not be perfect, but need be only the best notice practicable under the circumstances, and each and every class member need not receive actual notice, so long as class counsel acted reasonably in choosing the means likely to inform potential class members.'"). Indeed, this method of providing notice has been routinely approved for use in securities class

actions and other similar class actions. *E.g.*, *Christine Asia*, 2019 WL 5257534, at *16 (finding that direct First Class Mail combined with print and Internet-based publication of Settlement documents was "the best notice practicable under the circumstances"); *Dornberger v. Metro Life Ins. Co.*, 203 F.R.D. 118, 123-24 (S.D.N.Y. 2001) (same).

VII. CONCLUSION

The $20 million Settlement obtained by Plaintiffs and Lead Counsel represents a substantial recovery for the Settlement Class, particularly in light of the significant litigation risks Plaintiffs faced, including the very real risk of the Settlement Class receiving no recovery at all. For the foregoing reasons, Plaintiffs respectfully request that the Court approve the proposed Settlement and Plan as fair, reasonable, and adequate.

DATED: October 27, 2020

Respectfully submitted,

ROBBINS GELLER RUDMAN
& DOWD LLP
SAMUEL H. RUDMAN
DAVID A. ROSENFELD
ALAN I. ELLMAN

s/David A. Rosenfeld
DAVID A. ROSENFELD

58 South Service Road, Suite 200
Melville, NY 11747
Telephone: 631/367-7100
631/367-1173 (fax)
srudman@rgrdlaw.com
drosenfeld@rgrdlaw.com
aellman@rgrdlaw.com

ROBBINS GELLER RUDMAN
& DOWD LLP
ELLEN GUSIKOFF STEWART
655 West Broadway, Suite 1900
San Diego, CA 92101
Telephone: 619/231-1058
elleng@rgrdlaw.com

HOLZER & HOLZER, LLC
COREY D. HOLZER
1200 Ashwood Parkway, Suite 410
Atlanta, GA 30338
Telephone: 770/392-0090
770/392-0029 (fax)
cholzer@holzerlaw.com

Lead Counsel for Plaintiffs

LAW OFFICES OF CURTIS V. TRINKO, LLP
CURTIS V. TRINKO
39 Sintsink Drive West, 1st Floor
Port Washington, NY 11050
Telephone: 516/883-1437
ctrinko@trinko.com

Additional Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that on October 27, 2020, I authorized a true and correct copy of the foregoing document to be electronically filed with the Clerk of the Court using the CM/ECF system which will send notification of such public filing to the all counsel registered to received such notice.

s/ David A. Rosenfeld
DAVID A. ROSENFELD