UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

FRESNO COUNTY EMPLOYEES' RETIREMENT ASSOCIATION, EMPLOYEES' RETIREMENT SYSTEM OF THE CITY OF BATON ROUGE AND PARISH OF EAST BATON ROUGE, and WILLIAM HUFF, Individually and on Behalf of All Others Similarly Situated, Plaintiffs, v. COMSCORE, INC., SERGE MATTA, MELVIN WESLEY III, MAGID M. ABRAHAM, KENNETH J. TARPEY, WILLIAM J. HENDERSON, RUSSELL FRADIN, GIAN FULGONI, WILLIAM KATZ, RONALD J. KORN, JOAN LEWIS, RENTRAK CORPORATION, DAVID BOYLAN, DAVID I. CHEMEROW, WILLIAM ENGEL, PATRICIA GOTTESMAN, WILLIAM LIVEK, ANNE MACDONALD, MARTIN O'CONNOR, BRENT ROSENTHAL, and RALPH SHAW, Defendants.	Case No. 1:16-cv-01820-JGK

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

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Pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, Lead Plaintiffs Fresno County Employees' Retirement Association ("Fresno") and Employees' Retirement System of the City of Baton Rouge and Parish of East Baton Rouge ("Baton Rouge"), on behalf of themselves and the Settlement Class,[1] respectfully submit this memorandum of law in support of their motion for final approval of the proposed Settlement and for approval of the proposed plan of allocation of the proceeds of the Settlement.

PRELIMINARY STATEMENT

Subject to Court approval, Lead Plaintiffs have agreed to settle all claims in the Action in exchange for a payment of $110 million, consisting of $27,231,527.20 in cash and $82,768,472.80 in shares of comScore common stock. Lead Plaintiffs respectfully submit that the proposed Settlement is an excellent result for the Settlement Class and satisfies the standards for final approval under Rule 23 of the Federal Rules of Civil Procedure. As stated in the accompanying Browne Declaration,[2] the Settlement represents nearly 24% of the approximately $464 million in maximum damages estimated by Lead Plaintiffs' damages expert.

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[1] Lead Counsel are simultaneously submitting the Declaration of John C. Browne in Support of (I) Plaintiffs' Motion for Final Approval of Settlement and Plan of Allocation, and (II) Lead Counsel's Motion for an Award of Attorneys' Fees and Reimbursement of Litigation Expenses (the "Browne Declaration") (cited as "¶" or "Ex."). Capitalized terms have the meanings ascribed in the Browne Declaration or the Stipulation of Settlement (ECF No. 250-1) (the "Stipulation").

[2] Lead Plaintiffs respectfully refer the Court to the Browne Declaration for a detailed description of: the history of the Action (Section II); the nature of the claims (Section II(A)); the negotiations leading to the Settlement (Section III); the risks of continued litigation (Section IV); the Plan of

(Cont'd)

This very favorable recovery is particularly noteworthy because it achieves a substantial recovery of $83 million above the amount of available insurance proceeds in the form of comScore common stock. This is a considerable achievement given the financial condition of comScore, and Lead Plaintiffs respectfully submit this provides an enormous and unusual benefit to the Class.

Lead Plaintiffs and Lead Counsel have a well-developed understanding of the strengths and weaknesses of the Action. Lead Counsel has committed the resources necessary to comprehend fully the Class' claims and Defendants' defenses. These efforts are detailed with particularity in the Browne Declaration, and include investigating claims and drafting two detailed amended complaints (¶¶30-39), successfully opposing Defendants' motions to dismiss through lengthy briefing and at oral argument (¶¶47-52), consulting extensively with experts concerning loss causation, damages, market efficiency, and accounting issues (¶¶33, 116-18, 147), conducting intense, arms-length settlement negotiations in the context of a formal mediation and following the mediation (¶¶58-63), reviewing more than 178,000 documents relating largely to complicated accounting issues (¶¶106-110), and conducting nine interviews of senior comScore employees (¶¶111-15).

The Settlement is an outstanding result, particularly in light of the substantial risks of continued litigation. ¶¶138-49. While Lead Plaintiffs and Lead Counsel believe that the claims asserted are meritorious, they recognize the substantial challenges to establishing Defendants' liability, demonstrating loss causation, proving Class-wide damages, and achieving a greater recovery. ¶¶150-64.

Allocation for the Settlement proceeds (Section IX); and the work performed by Plaintiffs' Counsel (Section X).

There were substantial ability-to-pay risks present in this case, as comScore has a history of net losses, has been de-listed from the NASDAQ for more than a year, and recently issued a restatement of its financial statements covering a period of several years. Even if Lead Plaintiffs were successful in establishing liability at trial (and after appeals from any verdict), comScore likely would have been unable to pay a judgment. ¶¶144-49.

There were also substantial risks to establishing liability. Defendants would have vigorously defended themselves and forced Lead Plaintiff to produce evidence on each element of securities laws. In particular, Defendants would have contended they did not act with the necessary scienter to commit securities fraud, which would have centered the case on complex issues of proof regarding subjective accounting guidelines and Defendants' state of mind, with no guarantee that Lead Plaintiffs would prevail. ¶¶150-57. And even if Lead Plaintiffs were successful in establishing liability at trial, there were substantial risks to damages. Defendants had cogent loss causation arguments that, if accepted at summary judgment, *Daubert* motions, trial or appeal, would have drastically reduced Class-wide damages. ¶¶158-61.

The Settlement avoids these risks and delays while providing a substantial, certain, and immediate benefit to the Settlement Class in the form of a $110 million payment. In light of these considerations, Lead Plaintiffs and Lead Counsel respectfully submit that the Settlement warrants final approval by the Court.

ARGUMENT

I. THE PROPOSED SETTLEMENT WARRANTS FINAL APPROVAL

Rule 23(e) of the Federal Rules of Civil Procedure require that a class action settlement must be presented to the Court for approval, and should be approved if the Court finds it "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2); *see In re Citigroup Inc. Bond Litig.*, 296 F.R.D.

147, 154 (S.D.N.Y. 2013); *In re Am. Int'l Grp., Inc. Sec. Litig.*, 293 F.R.D. 459, 464 (S.D.N.Y. 2013).

Public policy favors the settlement of disputed claims among private litigants, particularly in class actions. *See Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 116 (2d Cir. 2005) ("[W]e are mindful of the 'strong judicial policy in favor of settlements, particularly in the class action context[.]'"); *In re Citigroup Inc. Sec. Litig.*, 2014 WL 2112136, at *2-*3 (S.D.N.Y. May 20, 2014); *In re IMAX Sec. Litig.*, 283 F.R.D. 178, 188 (S.D.N.Y. 2012); *In re Giant Interactive Grp., Inc. Sec. Litig.*, 279 F.R.D. 151, 160 (S.D.N.Y. 2011).

A. The Settlement Was Reached After Arm's-Length Negotiations And Is Procedurally Fair.

A settlement is entitled to a "presumption of fairness, adequacy, and reasonableness" when "reached in arm's length negotiations between experienced, capable counsel after meaningful discovery." *Wal-Mart*, 396 F.3d at 116; *In re Facebook, Inc. IPO Sec. & Derivative Litig.*, 2015 WL 6971424, at *3 (S.D.N.Y. Nov. 9, 2015), *aff'd*, 674 F. App'x 37 (2d Cir. 2016); *see also In re Advanced Battery Techs. Sec. Litig.*, 298 F.R.D. 171, 179 (S.D.N.Y. 2014) (finding strong initial presumption of fairness attaches where "the settlement is reached by experienced counsel after arm's length negotiations."); *In re PaineWebber Ltd. P'ships Litig.*, 171 F.R.D. 104, 125 (S.D.N.Y. 1997) (finding "a strong initial presumption of fairness" "[s]o long as the integrity of the arm's length negotiation process is preserved"), *aff'd*, 117 F.3d 721 (2d Cir. 1997).

The Settlement merits a presumption of fairness because it was achieved after extensive arm's-length negotiations by well-informed and experienced counsel. ¶¶57-66. The Settling Parties and their counsel were knowledgeable about the strengths and weaknesses of the case prior to finalizing the Settlement Stipulation. For example, Lead Counsel had: conducted a thorough investigation prior to filing the Complaint; prepared two detailed Complaints; briefed and

successfully opposed Defendants' motion to dismiss; consulted extensively with experts in the areas of the damages, loss causation, market efficiency, and accounting; and engaged in extensive settlement negotiations with Defendants' Counsel. ¶¶30-39, 47-52, 57-66, 116-18, 147. In addition, Lead Counsel had conducted meaningful Due Diligence Discovery prior to finalizing the Settlement Stipulation. ¶¶90-118. As a result, Lead Plaintiffs and Lead Counsel had a more than adequate basis for assessing the strength of the Settlement Class's claims and Defendants' defenses when they entered into the Settlement.

Further, the proposed Settlement is the product of an extensive mediation process involving the direct participation of representatives and principals from Plaintiffs and the Settling Defendants, under the auspices of an experienced and highly respected mediator, the Honorable Layn Phillips (ret.). ¶¶57-60. The active involvement of an experienced, independent mediator provides strong evidence of the absence of collusion, and supports approval of the Settlement. *See D'Amato v. Deutsche Bank*, 236 F.3d 78, 85 (2d Cir. 2001) (mediator's involvement "helps to ensure that the proceedings were free of collusion and undue pressure"); *In re AOL Time Warner, Inc. Sec. and ERISA Litig.*, 2006 WL 903236, at *7 (S.D.N.Y. Apr. 6, 2006); *In re Indep. Energy Holdings PLC*, 2003 WL 22244676, at *4 (S.D.N.Y. Sept. 29, 2003) ("[T]hat the Settlement was reached after exhaustive arm's-length negotiations, with the assistance of a private mediator experienced in complex litigation, is further proof that it is fair and reasonable.").

The conclusion of Lead Plaintiffs and Lead Counsel that the Settlement is fair, reasonable, and in the best interests of the Settlement Class further supports its approval. Lead Plaintiffs are sophisticated institutional investors (*see* ¶199) that took an active role in supervising this litigation—in the manner envisioned by the Private Securities Litigation Reform Act of 1995 (the "PSLRA")—and have strongly endorsed the Settlement. *See* H.R. Conf. Rep. No. 104-369, at *32

(1995), reprinted in 1995 U.S.C.C.A.N. 730, 731; *see also* Baton Rouge Declaration, Ex. 2, at §II; Fresno Declaration, Ex. 3, at ¶¶5-6. This creates "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).

In addition, Lead Counsel is highly experienced in securities class action litigation, and has likewise concluded that the Settlement is in the best interests of the Settlement Class. ¶193. Courts consistently give "'great weight' . . . to the recommendations of counsel, who are most closely acquainted with the facts of the underlying litigation." *In re NASDAQ Market-Makers Antitrust Litig.*, 187 F.R.D. 465, 474 (S.D.N.Y. 1998); *see also Shapiro v. JPMorgan Chase & Co.*, 2014 WL 1224666, at *2 (S.D.N.Y. Mar. 24, 2014).

B. Application Of The *Grinnell* Factors Supports Approval.

The Settlement is also substantively fair, reasonable, and adequate, as considered under the well-established standards governing approval of class action settlements in the Second Circuit. In *City of Detroit v. Grinnell Corp.*, the Second Circuit held that the following factors should be considered in evaluating 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 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 Wal-Mart*, 396 F.3d at 117; *Advanced Battery Techs.*, 298 F.R.D. at 175; *Citigroup Bond*, 296 F.R.D. at 155; *In re Bear Stearns Cos., Inc. Sec. Derivative & ERISA Litig.*, 909 F. Supp. 2d 259, 265-66 (S.D.N.Y. 2012). "In finding that a settlement is fair, not every factor must weigh in favor of settlement, 'rather the court should consider the totality of

these factors in light of the particular circumstances.'" *In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 456 (S.D.N.Y. 2004) (quoting *Thompson v. Metro. Life Ins. Co.*, 216 F.R.D. 55, 61 (S.D.N.Y. 2003)). A court considering approval "should not attempt to approximate a litigated determination of the merits of the case lest the process of determining whether to approve a settlement simply substitute one complex, time consuming and expensive litigation for another." *White v. First Am. Registry, Inc.*, 2007 WL 703926, at *2 (S.D.N.Y. Mar. 7, 2007).

The Settlement satisfies the criteria for approval articulated in *Grinnell*.

1. The Complexity, Expense and Likely Duration of the Litigation Support Approval of the Settlement

"[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." *IMAX*, 283 F.R.D. at 189. In fact, "[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), and thus "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. Because the Settling Parties agreed in principle to settle shortly after the Court ruled on Defendants' motions to dismiss, achieving a litigated verdict for Lead Plaintiffs and the Class would have required additional years of additional time and expense, including completing: fact discovery; complex and expensive expert discovery on issues such as loss causation, damages and accounting; briefing on class certification and a potential Rule 23(f) appeal; an expected motion for summary judgment; and a trial. Even then, it is virtually certain that appeals would be taken from any verdict. ¶¶137-64. The foregoing would pose substantial expense for the Settlement Class and delay the Class's ability to recover—even assuming, of

course, that it succeeded. ¶164. In contrast, the Settlement provides an immediate and significant recovery of $110 million for members of the Settlement Class. *Id*. Accordingly, this factor supports approval of the Settlement.

2. The Reaction of the Settlement Class to the Settlement

A significant factor in considering the fairness and adequacy of a settlement is the reaction of the class to the proposed settlement. *See*, *e.g., Bear Stearns*, 909 F. Supp. 2d at 266-67; *In re FLAG Telecom Holdings, Ltd. Sec. Litig.*, 2010 WL 4537550, at *16 (S.D.N.Y. Nov. 8, 2010); *Veeco*, 2007 WL 4115809, at *7. Pursuant to the Preliminary Approval Order, the Court-appointed Claims Administrator, JND Legal Administration ("JND"), began mailing copies of the Notice Packet (consisting of the Notice and Claim Form) to potential Settlement Class Members and nominees on March 13, 2018. *See* Declaration of Robert Cormio Regarding (A) Mailing of the Notice and Claim Form; (B) Publication of the Summary Notice; and (C) Report on Requests for Exclusion Received to Date, Ex. [] (the "Cormio Declaration"), at ¶2. As of May 2, 2018, JND had mailed a total of 36,673 Notice Packets to potential Settlement Class Members and nominees. *See id*. ¶7. In addition, the Summary Notice was published in *Investor's Business Daily* and transmitted over the *PR Newswire* on March 26, 2018. *See id*. ¶8. The Notice set out the essential terms of the Settlement and informed potential Settlement Class Members of, among other things, their right to opt out of the Settlement Class or object to any aspect of the Settlement, as well as the procedure for submitting Claim Forms. ¶167.

While the deadline for Settlement Class Members to exclude themselves or object to the Settlement has not yet passed, to date, no objections to the Settlement or the Plan of Allocation and no requests for exclusion have been received. Cormio Decl. ¶11. The deadline for submitting objections and requesting exclusion from the Settlement Class is May 17, 2018. As provided in

the Preliminary Approval Order, as modified, Lead Plaintiffs will file reply papers no later than May 31, 2018 addressing any requests for exclusion and objections that may be received. ¶201.

3. The Stage of the Proceedings and the Amount of Information Available to Counsel Support Approval of the Settlement

For this factor, the "relevant inquiry . . . is whether the plaintiffs have obtained a sufficient understanding of the case to gauge the strengths and weaknesses of their claims and the adequacy of the settlement." *AOL Time Warner*, 2006 WL 903236, at *10. "The pertinent question is 'whether counsel had an adequate appreciation of the merits of the case before negotiating." *Khait v. Whirlpool Corp.*, 2010 WL 2025106, at *6 (E.D.N.Y. Jan. 20, 2010). "The parties 'need not have engaged in extensive discovery as long as they have engaged in sufficient investigation of the facts to enable the Court to 'intelligently make . . . an appraisal' of the settlement.'" *AOL Time Warner*, 2006 WL 903236, at *10 (quoting *In re Austrian & German Bank Holocaust Litig.*, 80 F. Supp. 2d 164, 176 (S.D.N.Y. 2000)); *see also In re Nissan Radiator/Transmission Cooler Litig.*, 2013 WL 4080946, at *7 (S.D.N.Y. May 30, 2013) (even where "the parties have not engaged in extensive discovery," this factor weighs in favor of approval after "plaintiffs conducted an investigation prior to commencing the action" and consulted with experts).

Here, Lead Counsel spent significant time and resources analyzing and litigating the legal and factual issues in this Action, including by conducting a substantive investigation prior to filing the Complaint that included review of SEC filings, research reports by securities and financial analysts, investor conference calls, press releases, media reports, and other public material. ¶¶31, 36. Lead Counsel also analyzed the movement and pricing data associated with comScore publicly traded common stock with the assistance of a damages expert. ¶36. Lead Counsel also consulted extensively with experts in accounting to assist it in evaluating the claims asserted. ¶¶33, 36. After filing the Complaint, Lead Counsel learned more about Defendants' defenses and the

risks to the Settlement Class's ability to recover through briefing Defendants' motions to dismiss, and then even more through settlement negotiations. ¶¶47-51, 57-68. Finally, in agreeing in principle to settle the Action, Lead Counsel expressly conditioned the Settlement on its ability to conduct meaningful Due Diligence Discovery into the fairness, reasonableness, and adequacy of the Settlement. ¶¶84-91. By the time Lead Plaintiffs finalized the Settlement Stipulation, Lead Counsel had already conducted significant Due Diligence Discovery. ¶¶92-100.

Thus, Lead Plaintiffs and Lead Counsel have "obtained sufficient information to be able to intelligently assess the strengths and weaknesses of the case and appraise settlement proposals." *Padro v. Astrue*, 2013 WL 5719076, at *6 (E.D.N.Y. Oct. 18, 2013); *see also Whirlpool*, 2010 WL 2025106, at *6 (factor supported approval where parties informally exchanged information and participated in mediation, which "allowed them to further explore the claims and defenses"). Accordingly, the substantial amount of information developed provided Lead Plaintiffs and Lead Counsel with a well-informed basis for their belief that the Settlement is highly favorable to the Settlement Class, and this factor supports approval of the Settlement.

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

In assessing the fairness, reasonableness and adequacy of a settlement, courts should consider the "risks of establishing liability [and] the risks of establishing damages." *Grinnell*, 495 F.2d at 463 (citations omitted). While Lead Plaintiffs had prevailed at the motion to dismiss stage, they nonetheless faced real risks in proving both liability and damages at trial, as explained below.

(a) Risks to Proving Liability

While Lead Plaintiffs and Lead Counsel believe that the claims asserted against Defendants in the Action are meritorious, they recognize that Defendants had meaningful defenses to liability

in this case. In particular, Lead Plaintiffs faced vigorous challenges from Defendants in proving that Defendants made actionable false statements and acted with scienter. ¶¶151-57.

Defendants have substantial arguments that Lead Plaintiffs could not establish the element of scienter—*i.e.*, that Defendants acted with a fraudulent state of mind and not merely negligence. ¶152. Defendants would point to the subjective nature of the accounting issues at the core of this case. ¶¶154-56. Both comScore and the Individual Defendants vigorously contend that the restatement does not constitute an admission that any Defendant violated the federal securities laws—indeed, certain Individual Defendants do not even concede that the restatement was correct. ¶153.

To the contrary, Defendants would hold Lead Plaintiffs to their burden of proof on the issues, and establishing the Class's claims would involve mustering evidence on multiple complex and hotly contested issues. For instance, the Complaint alleges that Defendants improperly recognized and reported millions of dollars in "nonmonetary revenue." Revenue recognition inherently calls for the exercise of judgment—and this general proposition applies with even more force here given the nonmonetary nature of the transactions. ¶154.

The parties would have disagreed as to how complicated facts fit into the meaning of terms such as "fair value," "reasonable basis," and "commercial substance." Defendants would argue that each of these are judgment-laden concepts made even more subjective by the niche consumer data that comScore purportedly exchanged. Defendants would also argue that the subjectivity baked into every step of the accounting at issue here may explain why comScore's auditor, Ernst & Young LLP, failed to detect errors that the Company later determined required restatement. In any event, the Parties' respective positions turn on fundamental disagreements about highly

technical issues, the resolution of which would have turned on dueling testimony offered by accounting experts. ¶155.

In sum, the parties were deeply divided on key fact issues, and there was no guarantee Lead Plaintiffs would prevail at either summary judgment or at trial. If the Settling Defendants had succeeded on any of these substantial defenses, Lead Plaintiffs and the Class would have recovered nothing at all or, at best, would likely have recovered far less than the Settlement Amount.

(b) Risks to Proving Damages and Loss Causation

Lead Plaintiffs and the Class also faced substantial risk in establishing loss causation and damages. Defendants would have argued that much of the decline in comScore's stock price during the Class Period was not attributable to the revelation of the alleged fraud. More specifically, Defendants would have argued that Class members could not recover for any stock price declines that occurred after comScore's February and March 2016 disclosures that the Company could not timely file financial statements, and that its Audit Committee was investigating "potential accounting matters" and had "proactively contacted the [SEC]." ¶¶131, 159.

Defendants would likely have contended that the alleged loss causation events occurring after these dates were merely the materializations of known risks, and consequently any stock price declines associated with those dates are not recoverable as damages. ¶131. While Lead Plaintiffs believe they have credible arguments in response, if Defendants' arguments had prevailed at summary judgment, in *Daubert* motions, or at trial, they would have eliminated a significant portion of the Class's damages would be eliminated. ¶¶132.

Lead Plaintiffs bear the burden of establishing loss causation. *See*, *e.g., Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 345-46 (2005). Resolving disputed issues regarding damages and loss causation would require expert testimony, and there is no doubt that the Settling Defendants would have been able to present a well-qualified expert who would opine that the class had little or no

damages. Courts recognize a substantial litigation risk from uncertainty as to which expert's view will be credited by the jury. *See In re Telik, Inc. Sec. Litig.*, 576 F. Supp. 2d 570, 579-80 (S.D.N.Y. 2008) (in this "battle of experts, it is virtually impossible to predict with any certainty which testimony would be credited, and ultimately, which damages would be found"); *Global Crossing*, 225 F.R.D. at 459 ("[P]roof of damages in securities cases is always difficult and invariably requires expert testimony which may, or may not be, accepted by a jury.").

In light of all of these risks, Lead Plaintiffs and Lead Counsel respectfully submit that it is in the best interests of the Settlement Class to accept the immediate and substantial benefit conferred by the Settlement, instead of incurring the significant risk of recovering a lesser amount, or nothing at all, after protracted litigation.

5. Risks of Maintaining Class Action Status through Trial

The Settling Defendants would undoubtedly have raised vigorous challenges to class certification, and such disputes "could well devolve into yet another battle of the experts." *Bear Stearns*, 909 F. Supp. 2d at 268. Even assuming Lead Plaintiffs successfully got the class certified, "there could be a risk of decertification at a later stage." ¶139; *Global Crossing*, 225 F.R.D. at 460. Here, "the uncertainty surrounding class certification supports approval of the Settlement," *In re Marsh & McLennan Cos. Sec. Litig.*, 2009 WL 5178546, at *6 (S.D.N.Y. Dec. 23, 2009), because "even the process of class certification would have subjected Plaintiffs to considerably more risk than the unopposed certification that was ordered for the sole purpose of the Settlement." *AOL Time Warner*, 2006 WL 903236, at *12.

6. The Inability of Defendants to Withstand a Greater Judgment

Courts find that "[t]his factor typically weighs in favor of settlement where a greater judgment would put the defendant at risk of bankruptcy or other severe economic hardship." *AOL Time Warner*, 2006 WL 903236, at *12; *see also Global Crossing*, 225 F.R.D. at 460 (defendants'

bankruptcy meant that "without the proposed settlement, class members might well receive far less than the settlement would provide to them, even if they could prevail on their claims"); *Maley v. Del Global Techs. Corp.*, 186 F. Supp. 2d 358, 365 (S.D.N.Y. 2002) (in light of the company's "dire financial condition, it is unlikely that the Company could withstand a substantial judgment," making a greater recovery than the settlement difficult); *In re Am. Bank Note Holographics, Inc. Sec. Litig.*, 127 F. Supp. 2d 418, 427 (S.D.N.Y. 2001) (crediting "serious question as to the ability of the Defendants to withstand a greater judgment"). Here, Lead Plaintiffs understood that, even if they were able to overcome the significant risks described above, they would still face the risk that comScore would be unable to satisfy any judgment due to its weakened financial condition and limited insurance. ¶¶144-49.

Specifically, after years of net losses, comScore's lengthy period without current financial statements had compounded its already precarious financial position. Until March 23, 2018, comScore had no current financial statements for ***any*** period after 2012 since it had announced its need to restate on September 15, 2016. Consequentially, the Company has been delisted from NASDAQ and lacked access to most sources of capital. If comScore had been forced to spend millions of dollars in litigation, it would significantly drain the Company's cash reserves at a time when the Company's *already* precarious position was even further constrained. ¶¶145-48.

The documents and information that Lead Counsel received during its Due Diligence Discovery, including additional financial information and interviews with comScore's President and former and current CFOs, have affirmed the Company's financial strain. ¶¶92-118. In addition, Lead Counsel retained the services of Loop Capital, an investment banking firm located in Chicago, Illinois, who assisted Lead Counsel in the mediation, prepared an analysis regarding comScore's ability to pay after reviewing financial information regarding comScore, and assisted

in conducting Due Diligence Discovery. Loop Capital's analysis supported Lead Counsel's conclusion that comScore lacked the ability to pay a judgment or settle the Action for an amount materially in excess of the proposed Settlement amount. ¶¶59, 116-18, 147.

As a result of these considerations, Lead Plaintiffs and Lead Counsel believe there was a very substantial risk that, even if Lead Plaintiffs prevailed on all issues through a lengthy litigation and secured a verdict at trial, the Settlement Class might not be able to recover on that judgment. ¶¶144-49. Accordingly, this factor weighs in favor of final approval of the Settlement.

7. The Range of Reasonableness in Light of the Best Possible Recovery and all Attendant Risks

Finally, courts consider the range of reasonableness in light of both the best possible recovery and litigation risks, assessing "not whether the settlement represents the best possible recovery, but how the settlement relates to the strengths and weaknesses of the case." *City of Providence v. Aeropostale, Inc.*, 2014 WL 1883494, at *9 (S.D.N.Y. May 9, 2014); *see also Sanofi-Aventis*, 2010 WL 3119374, at *4 (consideration whether "it provides a 'substantial recovery' in light of the relevant circumstances and does not 'compare the terms of the [s]ettlement with a hypothetical . . . measure of a recovery that might be achieved' through trial." (quoting *Veeco*, 2007 WL 4115809, at *11)). To do so, courts "consider and weigh the nature of the claim, the possible defenses, the situation of the parties, and the exercise of business judgment in determining whether the proposed settlement is reasonable." *Grinnell*, 495 F.2d at 462. A "reasonable" settlement "is not susceptible of a mathematical equation yielding a particularized sum," *PaineWebber*, 171 F.R.D. at 130; instead, "in any case there is a range of reasonableness with respect to a settlement," *Newman v. Stein*, 464 F.2d 689, 693 (2d Cir. 1972). Even "the fact that a proposed settlement may only amount to a fraction of the potential recovery does not, in and

of itself, mean that the proposed settlement is grossly inadequate and should be disapproved." *Grinnell*, 495 F.2d at 455; *see also Sanofi-Aventis*, 2010 WL 3119374, at *4.

Here, the proposed Settlement amount exhausts ***all*** available insurance coverage, and then goes even further by obtaining an ***additional*** approximately $83 million in benefit for the Settlement Class in the form of comScore stock. ¶¶5, 63. Lead Plaintiffs submit that the Settlement is well within the range of reasonableness in light of the best possible recovery and all the attendant risks of litigation. Lead Plaintiffs' damages expert developed a model to estimate the range of Class-wide damages in this Action, which estimates that the Settlement Amount represents nearly 24% of *maximum* Class-wide damages in the Action using a plaintiffs-friendly damages model. ¶129. Defendants' arguments could have reduced the Class's maximum recoverable damages to $184.5 million, meaning that the Settlement represents a nearly 60% recovery. ¶132. Either amount represents a very favorable resolution of the Action for Settlement Class Members, in light of all of the litigation risks discussed above.

* * *

In sum, the *Grinnell* factors support approval of the Settlement.

II. THE PLAN OF ALLOCATION IS FAIR AND REASONABLE

The Court should approve a plan for allocating settlement proceeds if it is fair, reasonable, and adequate. *See IMAX*, 283 F.R.D. at 192; *Bear Stearns*, 909 F. Supp. 2d at 270. A plan of allocation is appropriate as long as it has a "rational basis." *FLAG Telecom*, 2010 WL 4537550, at *21; *see also In re Initial Pub. Offering Sec. Litig.*, 671 F. Supp. 2d 467, 497 (S.D.N.Y. 2009). Courts "look primarily to the opinion of counsel" in evaluating a plan of allocation. *Giant Interactive*, 279 F.R.D. at 163. Generally, a plan of allocation that reimburses class members based on the relative strength and value of their claims is reasonable, *see IMAX*, 283 F.R.D. at 192,

though a plan of allocation does not need "mathematical precision," *PaineWebber*, 171 F.R.D. at 133.

Here, Lead Counsel developed the proposed plan of allocation (the "Plan of Allocation") in consultation with Lead Plaintiffs' damages expert, and submits that the Plan of Allocation provides a fair and reasonable method to allocate the Net Settlement Fund among Settlement Class Members. ¶172-79. In developing the Plan of Allocation, the expert calculated the estimated amount of artificial inflation in the per share closing price of comScore common stock that allegedly was proximately caused by Defendants' alleged false and misleading statements and material omissions. *Id.* In estimating this alleged artificial inflation, the expert considered price changes in comScore stock in reaction to certain public announcements allegedly revealing the truth concerning the alleged misrepresentations, and adjusted for price changes from market and industry factors. *See* ¶175; Notice ¶59. In addition, Lead Counsel further refined the Plan of Allocation in response to comments received from possible claimants after the Court granted preliminary approval, streamlining the procedure for the administrator to calculate claimants' recognized losses so as to provide a more equitable distribution of settlement proceeds. ¶173.

The Plan of Allocation will calculate a "Recognized Loss Amount" or "Recognized Gain Amount" for each share of comScore stock acquired during the Settlement Class Period that is listed in the Claim Form and for which adequate documentation is provided. ¶176; *see* Notice ¶¶58, 62. A multiple of 1.15 will be applied to Recognized Loss Amounts for shares of comScore stock acquired from the Rentrak Merger to account for the fact that those shares also have claims under Section 11 of the Securities Act and/or Section 14(a) of the Exchange Act. ¶176; *see* Notice ¶58.

In general, the Recognized Loss Amounts calculated under the Plan of Allocation will be the difference between the estimated artificial inflation on the date acquired and the artificial inflation on the date sold, or the difference between the actual purchase and sales price, whichever is less. ¶176; *see* Notice ¶63. Claimants who acquired comScore stock during the Settlement Class Period but did not hold through at least one of the alleged corrective disclosures will have no Recognized Loss Amount with respect to those transactions because any loss did not result from the alleged misstatements. ¶176; *see* Notice ¶61.

Pursuant to the Plan of Allocation, a Claimant's "Recognized Claim" will be the sum of its Recognized Loss Amounts minus the sum of its Recognized Gain Amounts, and the Net Settlement Fund will be allocated on a *pro rata* basis based on the relative size of the Recognized Claims. *See* Notice ¶¶70-71. The Plan of Allocation proposed here is substantially similar to other plans that have been approved and successfully implemented in other securities class action settlements. *See*, *e.g.*, *Veeco*, 2007 WL 4115809, at *14; *Global Crossing*, 225 F.R.D. at 462 ("Pro-rata distribution of settlement funds based on investment loss is clearly a reasonable approach.").

Lead Counsel believes that the Plan of Allocation provides a fair and reasonable method to allocate equitably the Net Settlement Fund among Settlement Class Members who suffered losses as result of the alleged misconduct. ¶177. Moreover, as noted above, as of May 2, 2018, more than 36,673 copies of the Notice, which contains the Plan of Allocation and advises Settlement Class Members of their right to object, have been sent to potential Settlement Class Members and their nominees. *See* Cormio Decl. ¶7. To date, no objections to the proposed Plan of Allocation have been received, further supporting its approval. *Id.* ¶11; Brown Decl. ¶178. *See In re NASDAQ Market-Makers Antitrust Litig.*, 2000 WL 37992, at *2 (S.D.N.Y. Jan. 18, 2000) (the "small number of objections to the Proposed Plan" gives "substantial weight" to approval).

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

Both the substance of the Notice and the method of its dissemination to potential members of the Settlement Class provided "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). Both also "fairly appris[ed] 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." *Wal-Mart*, 396 F.3d at 114 (discussing Rule 23(e)(1)); *see also In re Bank of Am. Corp. Sec., Derivative and ERISA Litig.*, 772 F.3d 125, 133 n.5 (2d Cir. 2014) (similar notice plan sufficient). The Court-approved Notice included 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 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 Settlement is proposed; (vi) a statement indicating the attorneys' fees and costs that will be sought; (vii) a description of Settlement Class Members' right to opt-out or to object; and (viii) notice of the binding effect of a judgment on Settlement Class Members. ECF No. 251. The Notice also included specific information about the voluntary dismissal of the Rentrak Defendants, which the Court found satisfactory. *See* Jan. 29, 2018 Hr'g Tr. 7:22-25, 9:20-21.

In accordance with the Preliminary Approval Order, the Court-approved Administrator began mailing copies of the Notice Packet to potential Settlement Class Members on March 13, 2018. Cormio Decl. ¶3. As of May 2, 2018, JND had mailed more than 36,673 copies of the Notice Packet by first-class mail to potential Settlement Class Members and nominees. *See id*. ¶7. In addition, JND caused the Summary Notice to be published in *Investor's Business Daily* and

transmitted over the *PR Newswire* on March 26, 2018. *See id*. ¶8. Copies of the Notice, Claim Form, Settlement Stipulation, and Complaint were made available on the Settlement website maintained by JND beginning on March 13, 2018, and copies of the Notice and Claim Form were also made available on Lead Counsel's website. *See id*. ¶10; Browne Decl. ¶¶167-70. This combination of individual first-class mail to all Settlement Class Members who could be identified with reasonable effort—supplemented by notice in an appropriate, widely-circulated publication, transmission over the newswire, and publication on internet websites—provided "the best notice . . . practicable under the circumstances." Fed. R. Civ. P. 23(c)(2)(B); *see, e.g., Advanced Battery Techs.*, 298 F.R.D. at 182-83; *Marsh & McLennan*, 2009 WL 5178546, at *12-*13.

IV. CLASS CERTIFICATION

Nothing has changed to alter the propriety of the Court's preliminary certification of the Settlement Class for settlement purposes only in the Preliminary Approval Order, and Lead Plaintiffs respectfully request that the Court grant final certification of the Settlement Class pursuant to Rules 23(a) and (b)(3) for all the reasons Lead Plaintiffs earlier set forth. *See* ECF No. 251.

CONCLUSION

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

Dated: May 3, 2018

Respectfully submitted,

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CERTIFICATION OF COMPLIANCE

As required by this Court's Individual Practice 2.D., I certify that this brief contains 6247 words (excluding the portions of the brief exempted by the Court's Individual Practices), and further certify that the brief complies with the Court's formatting rules.

Executed on May 3, 2018.

/s/ John C. Browne
John C. Browne